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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 304

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. RALL and R. E. LEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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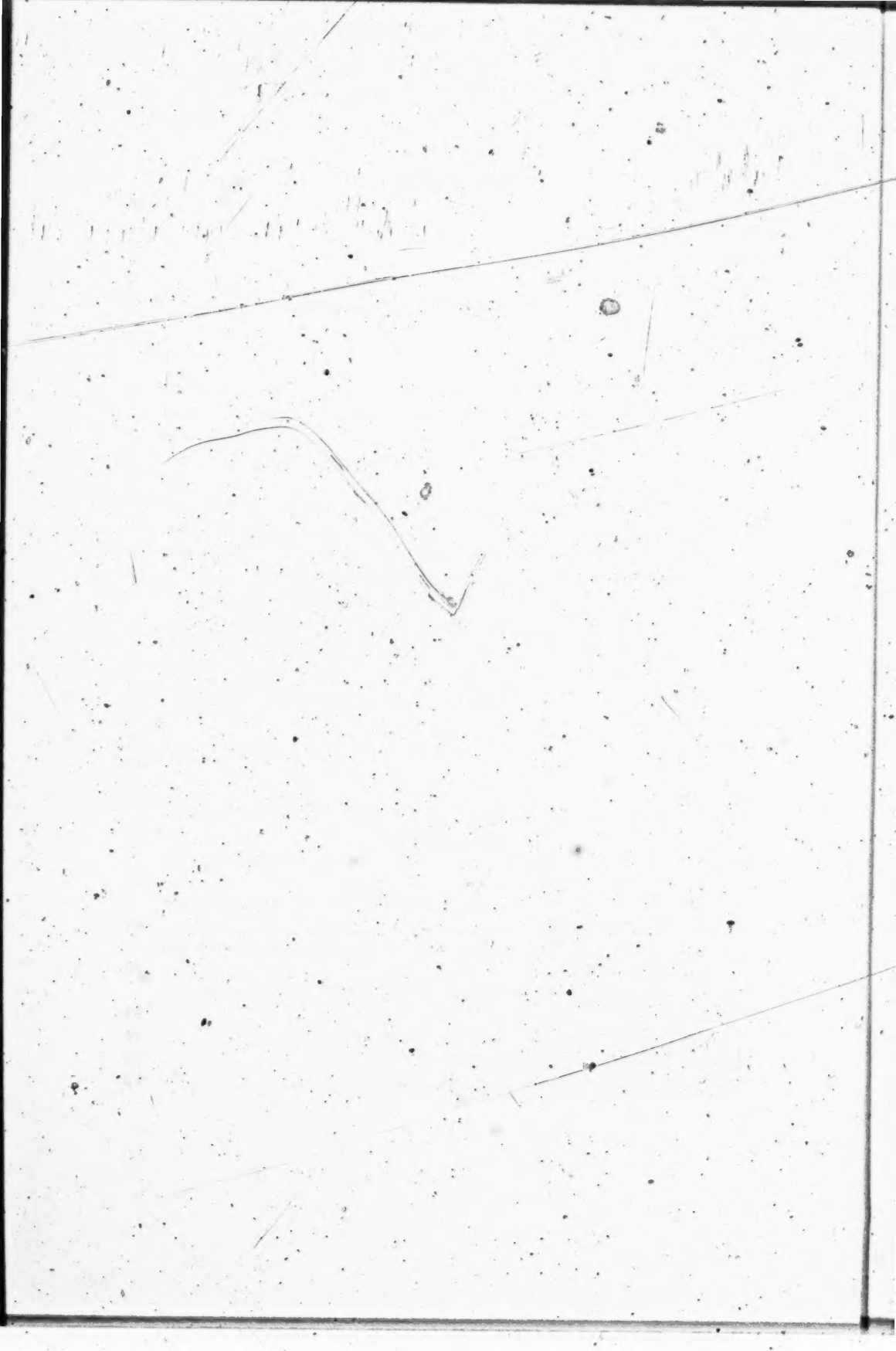

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Northwest Airlines, Inc. ("NWA") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 23, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.2d 136 (8th Cir. 1967), and is reprinted in Appendix A, *infra*, pp. 37-46. The opinion of the District Court (R. 73-77)[1] is not reported.

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[1]References to "R" are to the certified transcript of the record in this case.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 47) was entered on February 23, 1967. A petition for rehearing was timely filed, and the Court of Appeals entered its order denying said petition on March 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

If a federal court and jury are competent to pass on crucial elements of managerial imposition of safety disciplines in an airline employee's suit for alleged breach of contract, is not the same competence available in an airline employee's suit to enforce an award growing out of the same disciplines for the same alleged breach of the same contract?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is U. S. Const. amend. VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ."

The statutes involved are Railway Labor Act, Section 3, 48 Stat. 1189 (1934);[2] Section 7, 44 Stat. 582 (1926), *as amended* 45 U.S.C. §157 (1964); Section 8, 44 Stat. 584 (1926), *as amended* 45 U.S.C. §158 (1964); Section 9, 44 Stat. 585 (1926), *as amended* 45 U.S.C. §159 (1964); Section 201, 49 Stat. 1189 (1936); Section 204, 49 Stat. 1189 (1936); and Section 205, 49 Stat. 1190 (1936). Because of the length of the provisions, the pertinent text is reprinted in Appendix B, *infra*, pp. 57-64. The provisions of 28 U.S.C.A. §2403 may also be applicable. No court has cer-

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[2]This section was amended after the instant action was commenced. 80 Stat. 208 (1966), 45 U.S.C.A. §153. The text of the section before and after the amendment is set out in Appendix B, *infra*.

tified to the Attorney General the fact that the constitutionality of an Act of Congress affecting the public interest was drawn in question.

STATEMENT OF CASE

This cause arises out of disciplinary action by NWA which was taken because of management's morally justifiable and legally required concern for the safety of airline passengers. On February 8, 1964, NWA discharged pilots David G. Rall and Robert E. Lee, along with flight engineer Franklin E. Todd. R. 18, 22, 94. Rall was discharged because he had violated the NWA rule,[3] and the Air Line Pilots Association ("ALPA") rule as well, (R. 336) prohibiting the use of alcoholic beverages within 24 hours immediately preceding a flight to which he was assigned as a crew member. R. 18. Rall had been assigned as Captain on Flight NO27 which was to carry military passengers on a DC 7 propeller-driven airplane from the Hawaiian Islands to Eniwetok Atoll on the morning of January 1, 1964. R. 192, 389. Before Rall's discharge NWA's investigation showed that he had reported for Flight NO27 early on that New Year's Day in an intoxicated condition. Rall had also suffered a head injury, which had rendered him unconscious and caused him to bleed. R. 90-92, 97, 224-225. Rall's physical condition had been weakened by drinking, unconsciousness, vomiting, and persistent bleeding from his cuts. R. 196, 198, 394-396.

Co-pilot Lee was also discharged because he connived with Rall and technically served as first pilot because of Rall's apparent physical disability. R. 22.

Flight Engineer Todd was also discharged because of his drinking and because he had influenced and encouraged Rall,

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[3] "The use of alcoholic beverages by crew members while in uniform, on duty, on call, or during the 24-hour period immediately preceding departure time of any flight to which assigned as a crew member, is prohibited." R. 515.

Lee and other crew members to take Flight NO27 across the Pacific on New Year's Day, 1964, knowing of Rall's incapacity. R. 941. NWA also meted out safety-oriented discipline against other crew members in its efforts to establish management's overwhelming need for physically, emotionally and morally fit flight crew members. In this respect, the discharges of February 8, 1964, occurred only after the terrifying evidence of the misconduct of Captain Rall, Co-pilot Lee, and Flight Engineer Todd turned up in the course of an entirely unrelated investigation. R. 158.

Notwithstanding the violation of the NWA and the ALPA rule against pre-flight drinking, Rall, Lee and Todd all disputed their discharges. Rall and Lee's grievances ("minor disputes"[4]) were processed through the procedures established by the contracts between NWA and ALPA, each ultimately appealing to separate but identical five-man System Boards of Adjustment. Todd, the Flight Engineer and third in command of Flight NO27, also had a hearing before the Flight Engineers System Board.[5] The five-man ALPA System Board, despite a finding of a violation of the NWA and ALPA rules, ordered NWA to reinstate Rall and Lee with back pay. NWA's discharge of Todd was sustained by his System Board, the same neutral chairman presiding as in the Rall and Lee cases.

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[4]The Railway Labor Act, 44 Stat. 577 (1926), *as amended* 45 U.S.C. §§ 151-188, prescribes different procedures for the settlement of disputes between carriers and their employees, depending on the nature of the dispute. Courts have devised the terms "minor dispute" for disagreements concerning the interpretation of an existing contract, and "major disputes" which arise when a new contract is sought. See Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 33 (1957); International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963).

[5]Flight Engineers have a separate agreement with NWA, and are represented by the International Association of Machinists ("IAM"). The procedure is in all material respects the same under both the ALPA and IAM Boards. Walter L. Gray acted as neutral referee on the Board which considered the Todd case, as well as on each of the Boards which decided the Rall case and the Lee case.

This certiorari proceeding, therefore, grew out of a suit commenced on February 11, 1965, in which respondents sought enforcement of the two awards of the System Boards. The paramount interests of safety compelled NWA to refuse to comply with the Rall and Lee System Board awards, compelled it to resist their Petition for Enforcement, and compel it to continue that resistance now. It may be that the safety elements on a propeller-driven airplane are somewhat less critical than on a 600-mile per hour plus jet or the upcoming supersonic transports. The fact still remains that flight crew drinking presents an ever-present danger to the lives of millions of traveling Americans, and the ability of management to protect against the extraordinary hazards created by the use of alcohol by flight crew members is at the very root of this dispute. See Mohler, *Recent Findings on the Impairment of Airmanship by Alcohol,* Federal Aviation Agency pamphlet AM 66-29 (1966). The existence of this safety factor in the face of the confusion and doubt over the meaning and application of the Railway Labor Act, collective bargaining agreements entered into thereunder, common carrier duties and responsibilities and constitutional questions of trial by jury call for prompt and definitive action by this Court.

After the commencement of suit by respondents, and NWA's answer, respondents made two motions for summary judgment. The principal issue on both motions was the question of whether NWA was entitled to a full-fledged judicial trial on the issues growing out of the discharges of Rall and Lee.

On August 6, 1965, the District Court entered its first order, holding then that "the decisions overwhelmingly sustain the right of the carrier to a trial de novo in the enforcement proceedings. [Citing authority]." R. 53.

After this decision, respondents made a second motion for summary judgment, based upon the December 8, 1965, decision of this Court in *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965). The District Court entered its Order of July 20, 1966, denying NWA de novo review of the Awards. In a memorandum accompanying that Order, the Court certified, pursuant to 28 U.S.C. §1292(b), that the "order denying Northwest Airlines, Inc. a de novo review of the award [sic] of the System Board of Adjustment herein involves a controlling question of law about which there is substantial ground for differences of opinion and that an immediate appeal will materially advance the ultimate determination of this litigation." R. 77.

Petitioner's timely application for permission to appeal was granted by the Court of Appeals for the Eighth Circuit on August 15, 1967. The Court of Appeals, on February 23, 1967, affirmed the Order of the District Court denying NWA the right to make a full judicial presentation of evidence in support of the discharges of Rall and Lee. As heretofore noted, rehearing was also denied.

The question of the finality of the Awards of the System Boards herein was determined by both the District Court and the Court of Appeals, not on the basis of the contract between the parties, but on the basis of an interpretation of §3 of the Railway Labor Act, which is expressly made inapplicable to carriers by air.

I. THE QUESTION OF THE DEGREE OF FINALITY OF AWARDS OF AIRLINE SYSTEM BOARDS OF ADJUSTMENT IS A SOURCE OF CONFLICT BETWEEN AIR CARRIERS AND THEIR EMPLOYEES, AND WILL CONTINUE TO CREATE CONFLICT UNTIL IT IS AUTHORITATIVELY SETTLED BY THIS COURT.

There are more than 25 certificated United States commercial airlines subject to the provisions of the Railway Labor Act. Each of these airlines has contracts with unions representing employees and establishing System Boards of Adjustment. NWA, only one example, has contracts establishing separate System Boards for each of the fourteen crafts of employees represented by a total of eight unions.[6]

The relevant provisions of all of the contracts dealing with the finality to be accorded Awards of System Boards are virtually identical, and the provisions involved in the instant case are representative. They are printed at R. 5-12.

The question of the extent to which parties to Airline System Board contracts have ousted the traditional jurisdiction of Courts to hear suits for wrongful discharge thus affects hundreds of thousands of employees in addition to respondents Rall and Lee, and many airlines besides petitioner. The public interest in safe air travel is also involved herein.

Historically, judicial treatment of questions relating to

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[6] The unions representing employees of NWA are as follows: Air Line Pilots Association, International; Airline Dispatchers Association; Airline Employees' Association; Airline Society of Meteorologists; Brotherhood of Ry. and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; Northwest Airlines Foremen's Association; Transport Workers of America.

The separate crafts or classes represented by the unions are as follows: Airline Flight Pursers, Flight Service Attendants and Stewardesses; Airline Radio and Teletype Operators; Airline Navigators; Airline Pilots; Clerical, Office, Fleet and Passenger Service Employees; Dispatchers; Flight Engineers; Flight Kitchen Personnel; Instructors, Production Planners, Service Engineers, Technical Manual Writers, Service Analysts and Simulator Technicians; Link Trainer Operators; Mechanics and Related Personnel; Meteorologists; Plant Protection Men.

Airline System Boards has been tentative, unsophisticated and uncertain. Basically, three issues have been before the courts concerning Awards by Airline System Boards, *viz.*: (1) Must a discharged employee exhaust his administrative remedy before commencing a suit for wrongful discharge? (2) Does a federal district court have jurisdiction to consider Awards of Airline System Boards of Adjustment? and, the issue raised by this Petition, (3) To what extent have parties to Airline System Board contracts destroyed the competence of courts to hear suits involving a claim of wrongful discharge?

The question of whether an airline employee must exhaust his administrative remedies prior to bringing a suit for wrongful discharge was settled by this Court in the first reported case which raised the issue. *Transcontinental and Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953).[7]

The question of federal jurisdiction was answered in the affirmative by this Court in *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), contrary to the two earlier cases in which the issue had been raised.[8]

By far the most widely litigated issue, and the issue which has not yet been settled by this Court, is the question of the "finality" to be accorded Awards of Airline System Boards. Certiorari has been unsuccessfully sought in five such cases,[9]

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[7]The vitality of that decision is questioned in Larsen v. American Airlines, Inc., 313 F.2d 599 (2d Cir. 1963).

[8]Metcalf v. National Airlines, Inc., 271 F.2d 817 (5th Cir. 1959); Airline Pilots Ass'n, Int'l, v. TransWorld Airlines, Inc., 203 F. Supp. 438 (W.D. Mo. 1962).

[9]Capital Airways v. Air Line Pilots Ass'n, Int'l, 341 F.2d 288 (6th Cir. 1965), *cert. denied*, 381 U.S. 913, 952 (1965); Wooley v. Eastern Air Lines, Inc., 250 F.2d 86 (5th Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); Sigfred v Pan American World Airways, Inc., 230 F.2d 13 (5th Cir. 1956), *cert. denied*, 351 U.S. 925 (1956); Bower v. Eastern Airlines, Inc., 214 F.2d 623 (3d Cir. 1954), *cert. denied*, 348 U.S. 871 (1954); and Edwards v. Capital Airlines, Inc., 176 F.2d 755 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 885 (1949).

and the issue has been raised in five other cases,[10] besides the instant case.

This volume of litigation, and the Petitions for Certiorari, attest to the general importance of the issue. The confusion surrounding the issue is apparent. For example, since the System Board makes an "Award," courts have confused System Boards with Boards of Arbitration. See *Capital Airways v. Air Line Pilots Ass'n, Int'l*, 341 F.2d 288 (6th Cir. 1965), *cert. denied*, 381 U.S. 913, 952 (1965).

The only true arbitration provisions of the Act are found in Sections 7-9. Section 7[11] provides that both major and minor disputes may be settled by arbitration rather than through mediation or submission to an "appropriate board of adjustment". Section 8[12] spells out the requisite and technical elements of an agreement to arbitrate, and Section 9[13] details the essentially mechanical method of enforcement of the resulting arbitration award.

It seems rather elementary that when Airline System Board agreements, such as that involved herein, do not comply with the provisions of Section 8, they are not in fact agreements to arbitrate, and therefore the enforcement provisions of Section 9 are also inapplicable. Nonetheless, confusion between enforcement of Airline System Board Awards and Section 9 Arbitration Awards persists, and will continue unless this Court grants certiorari and settles the question. It is not an answer to say that Section 9 arbitration is ad hoc and voluntary while Airline System Boards are continuing and

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[10] Arnold v. United Air Lines, Inc., 296 F.2d 191 (7th Cir. 1961); Bates v. Northwest Airlines, Inc., 171 F. Supp. 273 (D. Minn. 1959); Farriss v. Alaska Airlines, 113 F. Supp. 907 (W.D. Wash. 1953); Hartley v. Pan American Airways, Inc., 98 F. Supp. 247 (N.D. Cal. 1951); American Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 91 F. Supp. 629 (E.D. N.Y. 1950).

[11] 44 Stat. 582 (1926), *as amended*, 45 U.S.C. §157 (1964).

[12] 44 Stat. 584 (1926), *as amended*, 45 U.S.C. §158 (1964).

[13] 44 Stat. 585 (1926), *as amended*, 45 U.S.C. §159 (1964).

compulsory, because the question still remains as to the enforcement of Airline System Board Awards. Congress could have made enforcement of Airline System Board Awards as precise as that prescribed in Section 9, but it has not seen fit to do so.

But an even more basic and fundamental confusion exists in this case and others involving Airline System Boards, concerning the distinction between Awards of the National Railroad Adjustment Board ("NRAB") and Awards of Airline System Boards.

Section 3 of the Act was expressly made inapplicable to air carriers by §201 of the Act, 49 Stat. 1189 (1936), although all of the other provisions of the Act do apply to air carriers. Instead, air carriers and their employees were required by Section 204, 49 Stat. 1189 (1936) "to establish a board of adjustment of jurisdiction *not exceeding* the jurisdiction which may be lawfully exercised by [railroad] system, group or regional boards of adjustment under the authority of Section 3" of the Railway Labor Act (emphasis supplied). It was because of the inapplicability of §3 to airlines that this Court was called upon, in *Central Airlines, supra,* to decide whether any basis of federal jurisdiction existed.

Despite the fact that §3 of the Act is expressly made inapplicable to air carriers, courts, including the courts below in the instant case, frequently have used decisions construing §3 when determining the scope of review of Airline System Board Awards. Indeed, the District Court herein, having once denied respondents' motion for summary judgment, reversed itself and partially granted summary judgment, basing the reversal on the decision in *Gunther v. San Diego & Ariz. E. Ry., supra,* a decision which, though fraught with uncertainty, deals solely with the expressly in-

applicable §3 of the Act. The Court of Appeals fell into the same error.

Courts are not alone in their confusion over the effect to be given §3 in cases involving airlines. Litigants and labor contract negotiators in this case and others are faced with the same difficulties. Because some courts *have* applied §3 to airlines, despite the proscription in §201, both litigants and negotiators find themselves occasionally inadvertantly accepting the applicability of that section. If certiorari is granted herein, the confusion can be halted and a decision reached which will give airlines and their employees a reliable guide through future negotiations or litigation.

Even more important, a definitive decision here will at last mark out the quantum of finality which this Court has so far only termed "some degree". *International Assn. of Machinists v. Central Airlines, Inc., supra.* With such a decision in the case at bar, all air carriers and their employees can be told and will know that unless they explicitly waive court and constitutionally protected review on the merits of grievances, a federal question is presented which will allow resolution of legal issues by federal courts and factual issues by juries.

By such a decision, this Court can accomplish a number of ends, all significant to sound labor relations and consistent with due concern over uninterrupted and safe interstate transportation, all valuable in the even handed administration of justice, all consonant with the principle of first recourse to administrative remedies, and all reconcilable with constitutional guarantees. The decision which reaches these administrative ends is quite simple. It reduces itself to the following step by step analysis.

1. Air carriers are required to provide contractual grievance machinery to handle disputes over contract interpretation and administration, including disciplinary action;

2. Air carriers, their employees and unions must first invoke and comply with the contractual machinery before (a) resorting to self-help, or (b) filing suit;

3. When the contractual grievance machinery has been completed, or while it is in progress, the moving party (air carrier, union or employee) may bring a federal action to protect or enforce the contractual machinery or the results thereof with the right to jury trial preserved on all aspects which fall within the constitutional protection.

This kind of a decision will perhaps require re-examination of *Koppal* but not of *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941), *Gunther* or *Walker v. Southern Ry.*, 385 U.S. 196 (1966), because they are under different law.

Any fear that this re-examination may result in proliferation of airline labor litigation or grievances is unfounded. The National Mediation Board can establish a National Air Transport Adjustment Board ("NATAB") to bring Airline System Board cases within the umbrella of *Gunther*, and open those awards only to the same extent as court review of NRAB awards.

Railroad System Boards, whose jurisdiction Section 204 Airline System Boards may not exceed, are permitted to be established by the provisions of §3 Second. §3 Second also permits dissatisfied parties to revoke such a Railroad System Board arrangement, and to elect to come under the jurisdiction of NRAB. But dissatisfied parties to Airline System Boards have no such recourse. Although §205 of the Act (49 Stat. 1190 (1936)) provides for the creation of NATAB at such time as the National Mediation Board ("NMB") concludes that it is necessary for the "prompt and orderly settlement of disputes," no such NATAB has yet been created, or even recommended. Yet, it is only NATAB, if and when created, which will have powers and duties, and whose "findings and awards [shall be] enforced . . . in the

same manner and to the same extent as provided with reference to [the NRAB] by section 153 of this title." Railway Labor Act, Section 205. Conversely, until NATAB is created, Airline System Boards may have decisional finality power of a lesser degree than NATAB. Consequently, the extent of the power of the courts to review the Awards as final, or something less than final, not yet settled by this Court, can be settled by granting this Petition for Certiorari.

Transcontinental and Western Air Lines v. Koppal, supra, establishes the competence of federal courts to determine the legal and factual merits of a dispute over the discharge of an airline employee in his initial lawsuit. It is confusing, to say the least, if the courts somehow lose their competence to decide the legal and factual merits of the discharge merely because the matter arises in the form of a suit to enforce an Airline System Board Award of reinstatement, while courts are still competent to hear a suit for damages for wrongful discharge. The issues to be decided are identical. The only difference in court access is procedural, in the option of suit or grievance by the employee or his union. If the airline employee opts to sue, he and the carrier get all the facts . . . including grave matters of air safety and alcohol. . . . before a court and jury. If the employee follows the minor dispute route, then what happens in court? That is the problem here.

In *International Ass'n of Machinists v. Central Airlines, Inc., supra,* this Court ruled that federal courts have jurisdiction to entertain a suit under a complaint to enforce an Airline System Board Award. Contractual provisions broadening or limiting the scope of judicial review [degree of finality] were also held within the parties' competence.

Some semantic problems here appear. If "utter finality" is agreed upon between an airline and its employees, then a federal court would, arguably, have no jurisdiction other

than to enforce an Airline System Board Award as if it were an appellate court reviewing a jury verdict. If "some degree of finality" less than "utter" is agreed upon, then the scope of federal review is expanded and the award may be given prima facie effect or even the weight [degree of finality], perhaps, of an expert opinion.

It is interesting that Section 3 First (p), as to railroads, utilized a very similar concept by giving NRAB division Awards a prima facie "degree of finality"; and that such a degree was likened, in *Washington Terminal Co. v. Boswell,* 124 F.2d 235 (D.C. Cir. 1941), aff'd by an equally divided court, 319 U.S. 732 (1943), to the weight of the opinion evidence of an expert.

But *Central Airlines* leaves unanswered important questions of whether contracts with provisions such as are here concerned precludes judicial review on the merits ["utter finality"] or gives the Awards prima facie, expert or some other degree of finality consistent with the Railway Labor Act. In short, the *Central Airlines* decision does not settle the most frequent, pervasive, and troublesome question involving Awards of Airline System Boards, and the issue is ripe for consideration at this time.

The instant case does not involve an isolated contract and a simple dispute between Messrs. Rall and Lee and NWA. Rather, it involves questions of importance to the entire billion dollar airline industry and all of its hundreds of thousands of employees, almost all being governed by contracts containing "some degree of finality" provisions.

As noted, an employee who is discharged may elect to proceed with a grievance before the Airline System Board or he may commence a suit for wrongful discharge and seek damages. The alternatives are mutually exclusive, and once one route is chosen, the other is forever closed. Until the question of the degree of finality problem is authoritatively

settled by this Court, an employee must make his decision in a vacuum, and must remain in doubt as to the advantages of one procedure against the other. Similarly, air carriers, faced with an Award they consider unjust and incorrect, must know whether the Award will be summarily sustained, or whether judicial review shall be permitted. Furthermore, negotiators for both air carriers and unions have no way of knowing what "degree of finality" less than "utter finality" may lawfully be fixed for Airline System Board Awards. Neither side can, therefore, foretell how far either may go in imposing or opposing safety discipline in a burgeoning industry.

A prompt decision by this Court is necessary to avoid the uncertainty and dispute permeating this cause. Further delay in resolving these doubts will result in further litigation between employees and air carriers, confuse contract negotiations, unsettle fail-safe air carrier regulations and hamper, if not frustrate, expeditious treatment of pending grievances throughout the nation's carriers by air.

II. THE COURT OF APPEALS HAS DECIDED THE QUESTION OF THE DEGREE OF FINALITY OF AWARDS OF AIRLINE SYSTEM BOARDS IN CONFLICT WITH DECISIONS OF THIS COURT AND IN CONFLICT WITH LONG-ESTABLISHED PRECEDENTS IN THE COURTS OF APPEALS.

The Court of Appeals herein affirmed the ruling of the District Court that NWA was not entitled to a full judicial presentation of its evidence on the issue of whether Captain Rall and Co-pilot Lee were properly discharged. Neither court examined the contract between the parties in determining whether there was only "some degree of finality", "utter finality" or something in between. Both courts made the silent assumption that the degree of finality of Awards of the statutory NRAB and of contractual Airline System

Boards was identical, and engrafted their interpretation of the provisions of the inapplicable Section 3 of the Railway Labor Act to the NWA - ALPA contract.

We have set forth in Part I of this Petition the reasons why we believe that §3 of the Railway Labor Act, and court decisions construing that section, are inapplicable to Awards of Airline System Boards. But if reference to §3 is permitted in determining the scope of review, the decision below is inconsistent with long-established precedents in the Courts of Appeals and overleaps constitutional jury rights. If, instead, reference to the applicable contract is required to determine the degree of finality agreed upon, then the Court of Appeals' decision herein is at odds with *International Ass'n of Machinists v. Central Airlines, supra.* In either case, certiorari should be granted by reason of the conflict between the decision of the Court below and decision of this Court and long-established precedent. Moreover, certiorari should be granted to clarify which alternative is correct.

The *Central Airlines* decision may be read to require federal courts, in a suit to enforce an Airline System Board Award, to consider two questions: (1) To what extent does the contract provide for some degree of finality and thus compress or expand a judicial review of the Award? and (2) Are these provisions consistent with the requirements of the Railway Labor Act? Or that decision may be read as holding that the System Board agreement involved therein, as a matter of law, foreclosed judicial review except as a ministerial matter.

Whichever alternative interpretation of the *Central Airlines* decision is correct, it is clear that the courts below in the instant case chose neither. Instead, they merely examined §3 of the Railway Labor Act, and then applied their interpretation of that section to the parties herein, with-

out examining the applicable contract to determine whether that result was warranted by the contract. Moreover, the decision was reached by the courts below in ruling on a Motion for Summary Judgment.

The decision of the Court of Appeals, then, conflicts with the implicit holding of the *Central Airlines* case that judicial review of Airline System Board Awards is determined by reference to the applicable contract, not the statute. It also conflicts with the plain language of §201 of the Railway Labor Act, which specifically excludes air carriers from coverage under §3.

But even if *Central Airlines* does permit courts to determine the finality of Airline System Board Awards and the scope of their judicial review by reference to §3 of the Railway Labor Act rather than the contract (which we dispute), the decision of the Court of Appeals herein is in conflict with the cases construing that section and at odds with NWA's right to a trial by jury.[14]

No fewer than sixteen cases in District Courts and Courts of Appeals have held that NRAB enforcement suits proceed de novo, and that a railroad may submit oral evidence on the merits of NRAB Awards.[15] All such NRAB Awards had

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[14]In 1966 Congress enacted amendments to §3. They are reprinted in Appendix B, *infra*, pp. 57-64. These amendments are not discussed in detail because we believe them to be inapplicable to the instant case: (a) because they were enacted more than one year after this action was commenced and more than fourteen years after the NWA-ALPA System Board was created; and (b) the amendments apply to suits to enforce NRAB awards under §3, not to Airline System Boards. In addition, the amendments appear to be constitutionally defective in that they deprive parties of a jury trial. The constitutional argument we make regarding the interpretation of §3 prior to the amendments (*infra*, pp. 49-57) applies with equal force to the issue of the constitutionality of the 1966 amendments.

[15]Washington Terminal Co. v. Boswell, 124 F.2d 235 (D.C. Cir. 1941), aff'd, 319 U.S. 732 (1943); Dahlberg v. Pittsburgh & L. E. R.R., 138 F.2d 121 (3d Cir. 1943); Thomas v. New York, Chi. & St. L. R.R., 185 F.2d 614 (6th Cir. 1950); Kirby v. Pennsylvania R.R., 188 F.2d 793 (3d Cir. 1951); Brotherhood of Ry. and S.S. Clerks v. Atlantic Coast Line R.R., 253 F.2d 753 (4th Cir. 1958); Boos v. Railway Express Agency, Inc., 253 F.2d 896

more than the "some degree of finality" which must attach to Airline System Board Awards, equal to the degree of finality which will be given to NATAB Awards once it is created.

No doubt the leading authority on this issue is *Washington Terminal Co. v. Boswell,* 124 F.2d 235 (D.C. Cir. 1941), *affirmed by an equally divided court,* 319 U.S. 732 (1943). The *Washington Terminal* case is the first case to hold that a District Court must conduct a de novo review of an award of a Railroad Adjustment Board.

In *Washington Terminal,* the Court of Appeals ruled that in an employee's suit for enforcement, the District Court must conduct de novo review. *Washington Terminal* rejected the employer's due process objections on the ground that the status quo remains in effect until the District Court has conducted a full hearing. The Court reasoned:

> "Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights. The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit de novo.[19] . . . *The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one.* That is hardly disputed." (Emphasis supplied.)

"[19]Because of its prima facie factual effect, the award may give the suit something more than the character of

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(8th Cir. 1958); Callan v. Great Northern Ry., 299 F.2d 908 (5th Cir. 1961); Hodges v. Atlantic Coast Line R.R., 310 F.2d 438 (5th Cir. 1962); Jones v. Central of Georgia Ry., 331 F.2d 649 (5th Cir. 1964); Brotherhood of R.R. Trainmen v. Louisville & N. R.R., 334 F.2d 79 (5th Cir. 1964); Order of Sleeping Car Conductors v. Pullman Co., 47 F. Supp. 599 (E.D. Wis. 1942); Hanks v. Delaware & H. R. Corp., 63 F. Supp. 161 (N.D. N.Y. 1945); Crist v. Public Belt R.R. Comm'n, 93 F. Supp. 103 (E.D. La. 1950); Ward v. New Orleans Public Belt R.R. Comm'n, 97 F. Supp. 1002 (E.D. La. 1951); Order of R.R. Telegraphers v. Union Pacific R.R., 231 F. Supp. 33 (D. Colo. 1964); Hanson v. Chesapeake & O. Ry., 236 F. Supp. 56 (S.D. W.Va. 1964). In Part III of this Petition we consider the effect of Günther v. San Diego & Ariz. E. Ry., 382 U.S. 257 (1965), on these precedents.

> a normal suit de novo. But the suit may be classified thus more accurately than as one for review proper."

124 F.2d at 244 (emphasis supplied).

In *Dahlberg v. Pittsburgh & L. E. R.R.*, 138 F.2d 121 (3d Cir. 1943), the Court of Appeals held that full judicial review was required. It reasoned that there must be some limitation on the meaning of the phrase "final and binding" as used in §3 First (m). It suggested that the words were used:

> ". . . in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

138 F.2d at 122.

Both *Washington Terminal* and *Dahlberg* squarely reached the conclusion that trial in District Court proceeds de novo. We cite in n. 15 the numerous other authorities which reach the same conclusion. No real purpose would be served in examining each of those cases here. The reasoning of some does warrant special comment, however.

As previously noted, the provisions of §§ 7-9 of the Act deal with arbitration of disputes as contrasted with the System Board involved herein. The Court in *Brotherhood of Railway Clerks v. Atlantic Coast Line R.R.*, 253 F.2d 753 (4th Cir. 1958), reasoned that Congress must have intended de novo review of NRAB Awards, because the plain language of §3 First (p) required it. In providing specially for the enforcement of awards of a board of arbitration created under §9, Congress had provided that the award simply be filed with the Clerk of District Court, and it would become conclusive upon the expiration of ten days unless impeachment were sought on the specified limited grounds set forth in the

statute. The provisions of §3 First (p) are more elaborate. Section 3 First (p) cannot be read to impose finality, the Court concluded, for Congress has shown its awareness of a method for providing for finality and has not chosen that method in §3. The Court recognized that to foreclose de novo review after a Board Award would be to ignore the plainly different methods provided by two sections of the same statute, or, to put it in context with *Central Airlines*, the statutory degree of finality of NRAB awards would become improperly identified with that of Section 9 arbitration awards despite Congress' deliberate selection of completely different language. And not even the 1966 amendments to §3 engraft the "utter finality" approach which is still provided in §9.

Again, assuming applicability of §3 to §204 Airline System Board Awards, we cannot ignore the fact that language of the Railway Labor Act (§3 First (p)) is almost identical to that provided for Interstate Commerce Commission ("ICC") orders. 24 Stat. 384 (1887).[16] It takes no concentration to observe the identical nature of ICC enforcement under §16(2) with that provided by §3 of the Railway Labor Act. Hence, when Congress created §3 of the Railway Labor Act with enforcement provisions practically copied from §16(2) of the Interstate Commerce Act, it guaranteed a full de novo hearing. In *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412 (1915), this Court said:

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[16] 49 U.S.C. §16(2) provides as follows:

"(2) Proceedings in courts to enforce orders; costs; attorney's fee. If a carrier does not comply with an order for the payment of money . . . the complainant . . . may file in the district court of the United States . . . a complaint . . . . Such suit . . . shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

> "[Section 16(2)] only established a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, *and takes no question of fact from either court or jury.* At most therefore it is merely a rule of evidence. *It does not abridge the right of trial by jury or take away any of its incidents.* Nor does it in any wise work a denial of due process of law." [Emphasis supplied].

236 U.S. at 430. This language was quoted with approval in *Southern Ry. v. Eichler,* 56 F.2d 1010, 1018 (8th Cir. 1932). In *Blair v. Cleveland, C., C. & St. L. Ry.,* 45 F.2d 792 (E.D. Ill. 1931), *aff'd* 59 F.2d 478 (7th Cir. 1932), the Court described the hearing as follows:

> "The hearing in this court is de novo, and the court is entitled to receive and consider evidence in addition to that before the Commission, but the prima facie case made out by the findings and order of the Commission will prevail unless overcome by evidence submitted by defendants."

45 F.2d at 793.

It would be more than an anomaly if the later Congressional enactments in the Railway Labor Act, §3 First (p) and the Interstate Commerce Act, 49 U.S.C. §16(2) were given such widely divergent effect as would result were this Court to hold that §3 First (p) does not provide an evidentiary hearing in "reviewing" NRAB awards. This is especially true since the Railway Labor Act provisions were enacted not only long after the Interstate Commerce Act, but long after the *Meeker* case. Congressional knowledge of this Court's interpretation of §16(2) of the Interstate Commerce Act must be presumed in such a situation.

Moreover, although §16(2) of the Interstate Commerce Act provides a separate non-reviewable method for the enforcement of non-money Awards, Congress chose to enact only one method for the enforcement of *either* money or non-money NRAB Awards by §3 First (p). That section clearly

contemplated a full hearing in District Court, at which the findings of the NRAB constitute, *by specific statutory language,* only prima facie evidence of the facts stated in those findings.

Courts have also been concerned with the question of insuring rights guaranteed under the Constitution, when examining the enforcement procedures of the Railway Labor Act and the Interstate Commerce Act. The answer has always been that the party who chose to take the dispute to the administrative tribunal has made an election about which he may not complain. The other party, the cases point out, is entitled to a full scale hearing in the enforcement proceedings which provides these Constitutional necessities. *E.g., Washington Terminal Co. v. Boswell, supra* (Railway Labor Act); *Meeker & Co. v. Lehigh Valley R.R., supra* (Interstate Commerce Act); *Baltimore & O. R.R. v. Brady,* 288 U.S. 448 (1933) (Interstate Commerce Act).

In the *Brady* case, this Court held that one who submits an issue to the ICC is bound by the decision. It explained:

> "The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind *him.* It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. *But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them.* The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final *as to him.*"

288 U.S. at 458. (Emphasis supplied).

The Court in *Southern Ry. v. Eichler,* 56 F.2d 1010 (8th Cir. 1932), considered this same issue in a proceeding

brought to enforce an ICC award. The Court reversed the ICC. It held that the evidence did not support the decision, and defined the role of the Court as follows:

> "If an order for reparation is made by the Commission, it can be enforced only by suit in some court of general jurisdiction. Section 16, 49 USCA p. 6. Thus the constitutional provisions guaranteeing trial by jury and due process of law (Const. U. S. Amendments 7 and 14) are satisfied. Meeker & Co. v. Lehigh Valley R.R. Co., 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644, Ann. Cas. 1916B, 691."

56 F.2d at 1013.

The right to a jury trial is guaranteed to NWA by the Seventh Amendment to the United States Constitution.

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

U. S. Const. amend. VII.

NWA did not invoke the System Boards. It does invoke the Constitution.[17]

As the cases previously cited have shown, this constitutional guarantee of a jury trial is satisfied only by de novo hearing of the sort provided the employer under §3 First (p). But the holding of the Court below in this case, by rejecting de novo review, deprives NWA of the right to a jury trial under a contract permissibly establishing a lesser degree of finality for an Airline System Board Award than the Act prescribes for an NRAB award.

The basic issue involved in the dispute herein is whether the discharge of Rall and Lee was demanded or justified by NWA's safety duties. The fact that respondents seek equitable relief does not eliminate the right to a jury trial. Thus

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[17]Our claim of right to jury trial embraces the need for compulsory attendance of witnesses, cross-examination of all witnesses, and all of the other elements essential to the maintenance of due process of law.

in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), the plaintiff brought an action for declaratory judgment, seeking an injunction prohibiting defendant from instituting an anti-trust suit for damages. Defendant counterclaimed for damages. This Court held a jury trial essential. If anti-trust issues are triable to a jury in a treble damage action, it reasoned, then defendant could not be deprived of a jury trial merely because plaintiff took advantage of the declaratory judgment procedure and sued first. Justice Black stressed that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial be lost through prior determination of equitable claims." 359 U.S. at 510-511.

Similarly, in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), this Court required a trial by jury:

> ". . . [T]he district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents' claim for equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims."

369 U.S. at 479.

We urge that NWA's right to a jury trial should not and cannot be abrogated merely because respondents sought equitable relief from the District Court.

The language of §3 First (m), when compared to the language of §3 First (p), creates what has been referred to as an enigma: §3 First (m) provides that the awards are to be "final and binding", while §3 First (p) provides that the enforcement proceeding:

> "Shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of

> the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . . If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee. . . . The district courts are empowered . . . to enforce or set aside the order of the division of the Adjustment Board."

Faced with the explicit language of §3 First (p), courts, as we have seen, ascribed to the language of §3 First (m) a meaning of final administrative action, subject to court review. (*e.g., Dahlberg v. Pittsburgh & L. E. R.R.*, 138 F.2d 121 (3d Cir. 1943); *Brotherhood of R.R. Trainmen v. Louisville & N. R.R.*, 334 F.2d 79 (5th Cir. 1964); *Jones v. Central of Georgia Ry.*, 331 F.2d 649 (5th Cir. 1964)). This result is consistent with the action of this Court in the face of other statutes which provide for finality. Professor Louis Jaffe, a widely acknowledged authority in Administrative Law, states: "A provision merely making the action of an officer 'final' is often held not to exclude review. It is sometimes said that such a provision emphasizes its *administrative* finality." (Emphasis supplied.) Jaffe, *Judicial Control of Administrative Action*, 356 (1965).

It would seem to be clear from the foregoing that if judicial scrutiny of Awards of Airline System Boards of Adjustment is to be determined by reference to §3 of the Act, the decision of the Court of Appeals is contrary to long established precedents. If reference to the contract is required by *Central Airlines*, the Court of Appeals has decided the issue in a way in conflict with that case. In any event, without clarification of what limited degree of finality airlines and unions may confer on their System Boards, or without answer to the applicability of §3 to Airline System Boards, no one can proceed to litigate or negotiate in this sensitive area with any assurance of the legal or practical consequences.

On the question unanswered by the Eighth Circuit, it is our position that the contract involved herein requires a

full de novo hearing in the suit for enforcement because it did not give the System Board Award anything like "utter finality."

The System Board Agreement was made in January, 1952. That agreement sets forth language almost verbatim to that in §3 First as then in force and interpreted. Thus, paragraph (k) of the Agreement provides that the decisions of the Board shall be "final and binding". R. 9. And in paragraph (m) it is said that "a majority vote of the Board shall be final, binding and conclusive." R. 9. All rights, under the Railway Labor Act, were preserved. R. 9-10.

It is patent that this language was selected in the light of the then known NRAB "degree of finality" decisions, viz., *nine* pre-1952 cases interpreting §3 of the Act[18] as requiring a full de novo review of NRAB Awards. The Court of Appeals, without examining the meaning of the contract, nonetheless summarily disposes of this argument on the ground that "*Gunther* interprets the statutory law as it has at all times here material existed," and, therefore, since §3 was meant to be incorporated into the contract, "utter finality" (the supposed interpretation of that section by *Gunther*) was *nunc pro tunc* imported into the "some degree of finality" mutual agreement of thirteen years standing.

This reasoning runs completely counter to the *Central Airlines* holding. It also misconstrues our argument, in that it is based on a belief that we argued that §3 was to be incorporated into the contract, and thus conceded that a later different construction or amendment of that section would ipso facto change the meaning of the contract. No such argument was intended or made. The error was compounded by the Court of Appeals when it proceeded (on assumption rather than on an interpretation of the contract as required

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[18]These cases are cited in n. 15 of this petition.

by *Central Airlines*) to hold that §3 forecloses judicial review by imparting "utter finality" to NRAB Awards and therefore NWA agreed to this conclusion.

Whatever may be the effect of *Gunther*, it certainly cannot magically and unilaterally change the pre-1952 interpretation of §3 to provide for anything more than "some degree of finality". The decision of the Court of Appeals results in the meaning and impact of the contractual language being changed with the vicissitudes of litigation between parties foreign to that contract, and governed by a section of the Railway Labor Act specifically made inapplicable to airline contracts and the parties thereto.

Under such circumstances, certiorari should be granted to resolve the conflict between the decision of the Court of Appeals and long-established precedents of this and other courts.

III. CERTIORARI SHOULD BE GRANTED TO PREVENT FURTHER MISCONSTRUCTION AND MISAPPLICATION OF THE DECISION OF THIS COURT IN GUNTHER V. SAN DIEGO & ARIZ. E. RY., 382 U.S. 257 (1965).

While it is our view, as more fully set out in Part I of this Petition, that the decision of this Court in the *Gunther* case is of no relevance to the instant case, since it involves an interpretation of an inapplicable section of the Railway Labor Act, we deal with the case for two rather obvious reasons.

First, the *Gunther* decision was relied upon by the courts below in the instant case, and for this reason alone certiorari should be granted to prevent the further misapplication of cases interpreting Section 3 to cases which do not arise under Section 3.

Another reason for examining the *Gunther* case is that the opinion has been uncritically read and applied by Courts.

We therefore assume arguendo that the *Gunther* decision is relevant to the issues raised in this Petition.

After the December 8, 1965, decision of this Court in *Gunther,* several courts immediately interpreted that decision as giving "utter finality" to, and thus foreclosing judicial review of, Awards of the NRAB.[19] In the instant case the District Court and the Court of Appeals so interpreted *Gunther,* and misapplied that interpretation to Awards of Airline System Boards.

We submit that such an interpretation of *Gunther* is incorrect for the following reasons: (1) the *Gunther* opinion yields several "curiosities" if it rejects de novo review; (2) the cases cited by the *Gunther* Court in its opinion do not reject de novo review; (3) rejection of de novo review does violence to the plain words of the statute, and obliterates the carefully drawn distinction between §3 First (p) and other statutory arbitration review provisions; (4) a recent Congressional amendment to §3 First (p) is wholly unnecessary if de novo review was already foreclosed; and (5) denial of de novo review infringes on carriers' Constitutional right to jury trials. (This latter point has already been discussed in part II of this Petition.)

The "curiosities" affecting the *Gunther* decision, if it is read to reject de novo review, can be summarized: (1) The *Gunther* opinion does not use the phrase "de novo" in either text or footnote. Neither does the opinion cite or in any other way take notice of the overwhelming number of decisions which uniformly hold that a trial de novo is required in an NRAB enforcement proceeding. One would think that if these cases were to be overruled and the de novo trial elimi-

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[19]Hanson v. Chesapeake & O. Ry., 367 F.2d 134 (4th Cir. 1966); Hodges v. Atlantic Coast L. R.R., 363 F.2d 534 (5th Cir. 1966); Taylor v. Hudson Rapid Tubes Corp., 362 F.2d 748 (3d Cir. 1966); Brotherhood of R.R. Signalmen v. Southern Ry., 254 F. Supp. 564 (M.D. No.Car. 1966); and Barrett v. Manufacturers Ry., 254 F. Supp. 376 (E.D. Mo. 1966).

nated, some mention of the phrase or reference to the cases which employ it would have been made in the opinion. The silence of this Court in this respect weighs heavily against an interpretation of its opinion which would eliminate de novo review.

(2) *Gunther* does not discuss or even acknowledge dissents by its author or by Justice Douglas in earlier cases before the Supreme Court involving §3. In *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), Justice Black said in his dissent:

> "[This case and *Union Pacific R.R. v. Price* appear to foreclose de novo review for a dissatisfied employee.] In contrast, however, a railroad may obtain a trial substantially *de novo* of *any* award adverse to it. For, under Section 3 First (p) of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order only by bringing, in a United States District Court, a suit which 'shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . .'"

360 U.S. at 558-559 (emphasis supplied). Similarly, in *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959), (cited in *Gunther*, 382 U.S. at 263), Justice Douglas had said, in a dissent joined by Justice Black:

> "Tolerance of judicial review has been more and more the rule as against the claim of administrative finality. [Citing authority]. The weight of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009, is on the side of judicial review, the finality of administrative action being sanctioned only where it is clear from the statutory scheme that judicial review is precluded."

360 U.S. at 619.

The pre-*Gunther* opinions of Justices Black and Douglas illustrated by the above quotations are certainly clear. Only

this Court can tell whether those views were overruled in *Gunther* without any mention whatever. We suggest that Justice Black, speaking for this court, has not changed his previous opinion in dissent; we submit that NRAB Award review is still de novo except cases in parity with the remarkable eleven-year *Gunther* litigation over managerial prerogatives versus contractual restraints thereon. Moreover, as we later show, *Gunther* was preoccupied with contract interpretation and the authority of a federal court to consider the merits of such an interpretation by an expert, not factual determination of the merits of cause for discharge.

(3) Finally, the assertion that the carrier was not entitled to de novo review in *Gunther* was made by neither of the parties to the dispute. That issue was raised in an amicus brief which cited none of the plethora of cases which guarantee the right to de novo review, but merely set forth cases arising under §301 of the Labor Management Relations Act. For that reason, this Court may inadvertently have used language which is now seized upon by respondents and courts to support a wholly unintended result.

The claim that *Gunther* rejects de novo review is infected with more than curiosities. An analysis of the cases cited in *Gunther* indicates that these cases do not support such a claim. At 382 U.S. 263 in the *Gunther* opinion, this Court says:

> "In Brotherhood of *Railroad Trainmen et al. v. Chicago River & Indiana R. Co.*, 353 U.S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have."

This statement is not accurate. The dispute between the parties in *Chicago River* had been submitted to the NRAB for only a few days when the legal proceedings were instituted. No decision had been rendered. The issue before this Court was whether a railroad union can strike over matters

pending before the Adjustment Board. 353 U.S. at 31. This Court held it could not. This is a far cry from a holding or even an indication that would preclude de novo review.

The *Gunther* opinion next quotes *some* of the language of the opinion in *Union Pacific R.R. v. Price,* 360 U.S. 601 (1959). The language quoted at 382 U.S. 263, from page 616 of the *Price* opinion, is not complete. The entire passage is set forth in full here, the portion italicized having been omitted in the *Gunther* quotation:

> "*This grist of labor relations is such that* the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, *past the action under §3 First (p) authorized against the noncomplying carrier,* see *Washington Terminal Co. v. Boswell,* 75 U.S. App. D.C. 1, 124 F.2d 235, aff'd by an equally divided Court, 319 U.S. 732, *or the review sought of an award claimed to result from a denial of due process of law,* see *Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541; *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579, 582. *So far as appears, all of the Courts of Appeals and District Courts which have dealt with this problem have reached the conclusion we reach here.*"

360 U.S. at 616-617 (emphasis supplied).

The *Price* case, it can be seen, actually supports the claim that de novo review is proper in NRAB *enforcement* proceedings. Moreover, the *Price* opinion deals with the question of the remedies available to an employee who has chosen the NRAB rather than a court, and who later is unhappy with his choice. Furthermore, *Price* approves *Washington Terminal* (as does *Central Airlines*) and *Gunther* does not even mention *Washington Terminal* which started the whole "degree of finality" discussion.

Slocum v. Delaware L. & W. R.R., 339 U.S. 239 (1950), (cited in *Gunther,* 382 U.S. at 261), involved a railroad

which had contracts with two separate unions. Each union claimed its members were entitled to certain jobs. The railroad brought a declaratory judgment action seeking a determination as to which one of the unions was entitled to the jobs. This Court held that this sort of dispute must be submitted to the NRAB. *Slocum* does not bear on "degree of finality."

Brotherhood of Locomotive Engineers v. Louisville & N. R.R., 373 U.S. 33 (1963) (cited in *Gunther*, 382 U.S. at 263), like *Chicago River*, involved the question of the right of a railroad organization to strike, where the railroad had complied with an order for reinstatement but disputed the amount of back pay. The case merely holds that there can be no strike under such circumstances.

This Court notes in *Gunther* at the outset:

> "We granted certiorari because the holding of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it."

382 U.S. at 260.

The only cases cited by Justice Black in *Gunther* were *Chicago River, Price, Slocum* and *Locomotive Engineers*. Presumably it is the construction of the Railway Labor Act in the cited cases with which the holding of the "two courts below" seemed to differ. We have seen above that these cases do not detract from the de novo rule. And we have not found one pre-*Gunther* case which questions that rule. The inconsistency between the lower court opinions and the cases cited in *Gunther*, then, must be found in some area other than that of de novo review. It is suggested that this inconsistency is in the decision which purports to oust the *jurisdiction* of the NRAB in disputes over alleged management prerogatives.

In *Chicago River* and *Locomotive Engineers* the labor organization sought to settle the dispute with the tools of eco-

nomic warfare, rather than use the orderly processes of the Railway Labor Act. And in *Price* the employee attempted to abort the NRAB procedures which he had himself invoked by commencing an action for wrongful discharge, rather than attempting to set the NRAB decision aside on the limited grounds available to him. *Slocum* involved an employer who sought to have the Court, rather than the NRAB, hear the jurisdictional dispute. In each of the cases cited in *Gunther*, the efforts aimed at avoiding the processes of the Act were not permitted by this Court.

Gunther involved the claim of the employer that the disqualification of an employee is strictly a "management prerogative" and that the NRAB had no jurisdiction to consider the issue. The District Court concluded that disqualification was indeed a management prerogative, unregulated by the collective bargaining contract.

The Court of Appeals in *Gunther* was of the opinion that the NRAB had exceeded its jurisdiction in considering the matter, drawing a distinction between discharge for cause, and disqualification. 336 F.2d at 547. The Court of Appeals also found disqualification to be a right of management.

It is submitted that the *holding* of the "two courts below" in *Gunther* which was counter to this Court's construction of the Railway Labor Act and LMRA, as well, can be found only by this analysis. The lower courts in *Gunther* purported to declare a class of subjects which were not within the jurisdiction of the NRAB. This Court would not permit that; and in so ruling merely said that the merits of NRAB contract interpretation could not be considered anew by a federal court. No issue of fact for trial by court or jury was involved. No purpose would have been served by a remand in *Gunther* for consideration as to whether *Gunther* need be reinstated. The sole issue remaining was the amount of back pay, on which issue *Gunther* ordered a trial. The *holding* of

Gunther, despite or because of the language employed and the circumstances included does not disturb the overwhelming authority assuring a jury trial in the case at bar.

As we have shown, an interpretation of *Gunther* which yields a conclusion that de novo review is not permitted infects that opinion with curiosities, and makes the cases cited inapropos to that conclusion. In addition, such a reading makes a recent congressional amendment to §3 of the Railway Labor Act appear to be an elaborate waste of congressional time.

It is an act of Congress which must be interpreted. In the event of ambiguity, the intent of Congress must be examined. Recent evidence of that intent can be found in the enactment of amendments to §3 First, on June 20, 1966. 80 Stat. 208 (1966). These amendments, adopted more than six months after the *Gunther* decision, eliminate the exception in §3 First (m) relating to money awards; and in §3 First (p) the phrase "shall be conclusive on the parties" is substituted for the phrase "shall be prima facie evidence of the facts therein stated." The amendments also add a proviso to §3 First (p) sharply restricting the area in which a court is free to set aside an award.

It is a well established principle of statutory construction that "the legislature, in adopting an amendment of a statute, intended to make some change in existing law." *Mogis v. Lyman-Richey Sand & Gravel Corp.,* 189 F.2d 130 at 141 (8th Cir. 1951). [Cite U. S. case.] In the *Mogis* case, the Court reasoned that, since a 1951 amendment to a statute eliminated a filing requirement, filing was required prior to the amendment. In the instant case, §§ 2(c), 2(d) and 2(q) of the 1966 amendments eliminate the de novo requirement. Therefore, de novo review was required prior to the amendments.

CONCLUSION

We urge, for the foregoing reasons, that certiorari be granted to prevent further misconstruction and misapplication of this Court's decision in the *Gunther* case. In addition, we urge that certiorari be granted to prevent engrafting Section 3 of the Railway Labor Act onto contracts creating Airline System Boards of Adjustment except as specifically agreed upon by the parties to those contracts. Finally, we urge that certiorari be granted to settle a fundamental question of law affecting the entire domestic airline industry, its hundreds of thousands of employees, and all of the many unions representing airline employees.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,523

Northwest Airlines, Inc.,

Appellant,

v.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 23, 1967.]

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by respondent Northwest Airlines, Inc., (NWA), from order entered on July 20, 1966, granting partial summary judgment to petitioners, Air Line Pilots Association (ALPA), David G. Rall and R. E. Lee. The material portions of said order read:

> "1. That the respondent, Northwest Airlines, Inc., is not entitled to a de novo review of the award of the System Board of Adjustment involving the individual petitioners, David G. Rall and R. E. Lee, with respect to any of the issues alleged in respondent's answer to the petition herein.
>
> "2. That the award of the System Board of Adjustment on the records reviewed by the Court in the

case of the individual petitioners named herein was not so arbitrary and capricious as to be wholly baseless and completely without reason, and therefore that defense is not sustained.

"3. That respondent shall reinstate petitioners to its employ in accordance with Award Nos. 5562 and 5563 of the System Board of Adjustment entered on January 8, 1965, subject, however, to the right of the respondent to limit, discharge or terminate petitioners' employment based upon events occurring or conditions existing after their discharge by the respondent, and the Court reserves jurisdiction to determine whether the events occurring or conditions existing after the discharge of these petitioners affect their right of reinstatement or limit the amount of back pay due them under the System Board's orders, and reserves jurisdiction as to the question of attorneys' fees to be allowed petitioners as provided in Section 153 First (p) of the Railway Labor Act.

"4. Judgment shall be entered accordingly. Exceptions are reserved."

The District Court made a 28 U.S.C.A. §1292(b) determination that the order denying NWA a de novo review of the System Board of Adjustment award involves a controlling question of law about which there is a substantial difference of opinion and that an immediate appeal will materially advance the ultimate determination of this litigation; that a lengthy trial on questions as to matters occurring subsequent to the discharge may be avoided in the event the trial court has erred in its determination of the issues relating to de novo review and the issue as to whether the determination of the System Board was arbitrary or capricious.

This court by order of August 15, 1966, authorized such interlocutory appeal, and the appeal has been timely taken.

NWA in its brief makes no contention that the court committed error in its determination that the award is not

arbitrary or capricious. By reply brief, NWA urges such issue is not before us. The notice of appeal is taken from the July 20, 1966, order which includes resolution of this issue. We hold such issue is raised by the appeal and that NWA has failed to demonstrate that the court erred in item two of its order, supra.

The basic issue presented by this appeal is whether the trial court erred in denying NWA a de novo trial—more particularly, a right to present oral testimony on the validity of the System Board of Adjustment award determining Rall and Lee are entitled to reinstatement. The validity of the trial court's decision turns upon the finality to be accorded the Board's determination on the reinstatement issue. For reasons hereinafter set forth, we hold that the trial court correctly determined that the portion of the award adjudicating that Rall and Lee were entitled to reinstatement is final and conclusive and that the court is without power to redetermine such issue.

The rather extensive record facts bearing upon the reasons for the discharge and the basis for the reinstatement have no direct bearing upon the issue here presented and hence the facts will be stated summarily. First Pilot Rall was permanently discharged for a violation of a NWA rule prohibiting a pilot from using intoxicants within twenty-four hours of the commencement of a flight. Lee was discharged for acting as chief pilot on a flight with Rall knowing the latter had an apparent physical deficiency caused by the use of intoxicants. Rall and Lee exhausted their grievance procedure provided by the contract existing between ALPA, the authorized bargaining agent for the pilots, and NWA.

On January 11, 1952, in conformity to and in compliance with 45 U.S.C.A. §184, ALPA and NWA entered into an agreement, still in force, creating the Northwest Airlines Pilots' System Board of Adjustment to decide minor dis-

putes arising under the terms of the working agreement between ALPA and NWA. The agreement provides that a decision can be made by a majority of the Board members and that the Board's decision on matters properly referable to it "shall be final and binding upon the parties." It is undisputed that the System Board which heard these cases was constituted in the manner provided by the agreement and authorized by statute and that after an evidentiary hearing, the Board majority by a written final order directed reinstatement of Rall as of November 1, 1964, and Lee as of May 1, 1964.

The controversy submitted to the Board falls in the minor dispute category over which the Board was given jurisdiction.

NWA having failed to comply with the award, the petitioners commenced this action in the District Court for the enforcement thereof on February 10, 1965. The District Court by memorandum opinion and order filed August 6, 1965, denied ALPA's motion for partial summary judgment based upon the same grounds as urged in the motion, the sustaining of which gives rise to the present appeal.

After the decision of the Supreme Court in *Gunther v. San Diego & Arizona Eastern R. Co.*, 382 U.S. 257, decided December 8, 1965, respondent again filed its motion for partial summary judgment, which motion was sustained by the court order herein appealed from.

The trial court, in a very well-considered unreported opinion filed March 7, 1966, with which we fully agree, states:

> "However, it is now perfectly clear, . . . that in *Gunther* the Court summarily has swept aside all former uncertainty as to the intent of Congress in the enactment of Section 153 of the Railway Labor Act and particularly as to Sections 153 First (m) and 153 First (p). . . . *Gunther* has limited the trial de novo to the back pay due the employee under the Board's award and any

other issue decided by the Board is to be accepted by the District Court. In other words, the court must accept the findings of the Board and is empowered to enforce them by mandamus or otherwise. The only fact issue for the court to determine is the amount of the money award based on the Board's findings and such additional evidence as may bear upon the amount."

Gunther, an engineer, was discharged for physical disability determined on the basis of a report of the railway's physician. The NRAB, to whom the dispute was submitted after the exhaustion of all remedies at the company level, after a full hearing ordered Gunther reinstated. Gunther applied to the District Court for enforcement. Enforcement was denied. The Court of Appeals affirmed. The Supreme Court reversed, stating inter alia:

"Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is twofold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Ajustment Board. . . .

"The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an en-

> gineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court." 382 U.S. 257, 263-64.

We completely agree with the trial court's view that the *Gunther* opinion as a whole, and the above quoted language in particular, compels a holding in this case that the System Adjustment Board's determination that Rall and Lee are entitled to reinstatement is final, conclusive and binding and must be accepted by the courts.

It is true as argued by NWA that many Courts of Appeal and District Court cases prior to *Gunther* have held otherwise. Such cases were cited and relied upon by the trial court in its memorandum opinion of August 6, 1965. The validity of such opinions has been struck down by *Gunther*. Post-*Gunther* cases have uniformly construed *Gunther* in the same manner as the trial court here. *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R.R.*, 10 Cir., ... F.2d .... (Dec. 28, 1966); *Hodges v. Atlantic Coast Line R.R.*, 5 Cir., 363 F.2d 534; *Kemp v. Atchison, Topeka & Santa Fe Ry.*, 5 Cir., 358 F.2d 722.

NWA summarized its position by stating that if *Gunther* is interpreted as foreclosing a de novo hearing on the reinstatement issue, it reaches a result:

(1) Not sought by either party in *Gunther;*

(2) Contrary to the opinions of the author of the *Gunther* opinion, expressed in earlier dissents;

(3) Contrary to every case decided by every court considering the issue prior to *Gunther;*

(4) Contrary to the provisions of the United States Constitution;

(5) Irrelevant to the issues considered by the cases cited in the *Gunther* opinion;

(6) Obliterating the distinction created by Congress between 45 U.S.C. §153 and §§ 157-159; and between §184 and §185;

(7) Ignoring the plain language of §153 First (p); and

(8) Not reached by Congress until more than six months after the *Gunther* decision.

Many of such contentions have already been answered. It is conceded that *Gunther* is the first Supreme Court case squarely adjudicating the issue before us. When the Supreme Court has spoken clearly upon the most recent occasion on which the pertinent issue has been considered, lower courts are bound to follow the pronouncements of law made.

In *Gunther,* the award was made by the National Railroad Adjustment Board created by 45 U.S.C.A. §153. In our present case, the award was made by a System Adjustment Board created by contract pursuant to statutory authority found in 45 U.S.C.A. §184. Under the latter section airline employees and labor representatives are authorized and directed to establish by contract System Boards of Adjustment having jurisdiction not exceeding that of §153 boards. It is conceded that jurisdiction equal to that of §153 boards may be established.

As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings. NWA argues that prior to *Gunther* de novo reviews existed under the circumstances here present and that the parties by their contract could give the Board no greater power than existed by law in a §153 Board. We believe such argument is based on a false premise. *Gunther* interprets the statutory law as it has at all times here material existed and does not purport to change any previous authoritative Supreme Court decision interpreting the statutory provisions

with respect to the scope of review of a board's nonmonetary award.

International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, holds that contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute (§184) and its policy and are governed by federal law, and "that the federal law would look with favor upon contractual provisions affording *some* degree of finality to system board awards." 372 U.S. 682, 694. See *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 8 Cir., 304 F.2d 206, 211.

Title 45 U.S.C.A. §153 was amended subsequent to *Gunther* by Public Law 89-456, 80 Stat. 208, effective June 20, 1966. The second sentence of §153 First (m) reading, "A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." was amended by striking therefrom the words "except insofar as they shall contain a money award." The second sentence of §153 First (p) was amended by striking therefrom the words "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof, "shall be conclusive on the parties." A new paragraph (q) was added giving either the carrier or the employees a right to petition to the district court for review. It again provides that the Board's order shall be conclusive and goes on to say that it may be set aside if beyond the Board's jurisdiction or for fraud or corruption.

NWA urges that Congress in making the foregoing amendments reflects its belief that the act before amendment provided for de novo review. Such argument is not persuasive. The principal accomplishment of the amendment is to attach finality also to the money award, an issue on which *Gunther* held courts had power to consider new evidence. See

Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R.R., supra.[1]

The issue of the court's jurisdiction was not raised in the trial court. By reply brief, NWA urges that §153 First (p) contains the exclusive provision for jurisdiction and that it likewise contains the provision that the Board's award "shall be prima facie evidence of facts therein stated." The first sentence of such section is broad, reading:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises."

The quoted section appears to be broad enough to confer jurisdiction. We do not believe that the asserted inconsistency between sub-sections (p) and (m) goes to the extent of destroying jurisdiction. It is a familiar rule of statutory construction that statutes must be read together and that the legislative intent must be given effect if possible. See 82 C.J.S. Statutes §§ 345, 366, and cases there cited.

Gunther expressly holds that the §153 First (m) provision of finality controls as to nonmonetary awards. The jurisdictional issue is not discussed in *Gunther*. Federal courts are bound to satisfy themselves with respect to jurisdiction,

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[1]It is interesting to note that the Tenth Circuit in Brotherhood of Railroad Trainmen determined that the 1966 amendments, which became effective while the appeal was pending before them, were controlling upon the basis that the repeal of the law conferring jurisdiction, absent a saving clause for pending cases, destroys jurisdiction in the pending case. Such issue was not raised in the case before us either in the trial court or upon appeal. Hence under the rules of judicial administration, we express no view upon such issue here.

whether the issue is raised or not. *Gunther* obviously is decided upon the basis that jurisdiction exists as to the money award.

It is quite true, as urged by NWA, that the Seventh Amendment guarantees trial by jury in suits of common law. However, it is equally well-settled that a right to a jury trial may be waived. Here the parties by their contract providing for final determination of minor disputes by a Systems Board authorized by §184 waived any constitutional right they might have had to a jury trial. Moreover, actions to enforce awards under arbitration agreements or statutes were not known to the common law. Courts in furtherance of the express policy favoring compulsory arbitration in labor disputes have customarily limited the scope of review of arbitration awards. *Gunther v. San Diego & Arizona Eastern Ry.*, supra; *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596; *Brotherhood of Railroad Trainmen v. Denver & Rio Grande R.R.*, supra. A contrary ruling on the jury trial issue would upset a long line of cases limiting review of arbitration awards.

We have given careful consideration to all the contentions vigorously urged by able counsel. We hold that the trial court correctly determined that the award made was not arbitrary or capricious and that NWA is not entitled to a de novo review of the portion of the award requiring reinstatement of Rall and Lee.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 18,523 September Term, 1966

Northwest Airlines, Inc.,

Appellant,

vs.

Air Line Pilots Association, International, David G. Rall and R. E. Lee,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 23, 1967

Order entered in accordance with Opinion.

/s/ Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eighth Circuit

APPENDIX B

Railway Labor Act, §3, 48 Stat. 1189 (1934) (prior to Amendments of 1966, 80 Stat. 208 (1966))

§153. National Railroad Adjustment Board.

First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on

which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after

the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the

carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and

the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request

of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules

of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,*

That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under

the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) of this section, with respect to a division of the Adjustment Board.

Second. Establishment of system, group, or regional boards by voluntary agreement.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

Railway Labor Act, §3, 48 Stat. 1189 (1934), as amended 45 U.S.C.A. §153 (1966)

§153. National Railroad Adjustment Board — Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the award

shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the

courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope

of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice-chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,*

That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the

same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) of this section, with respect to a division of the Adjustment Board.

System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which

may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event

the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board. As amended June 20, 1966. Pub. L. 89—456, §§ 1, 2, 80 Stat. 208, 209.

Railway Labor Act, §7, 44 Stat. 582 (1926), as amended 45 U.S.C. §157 (1964)

§157. Arbitration.

First. Submission of controversy to arbitration.

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons:

Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Manner of selecting board of arbitration.

Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure.

(a) Notice of selection or failure to select arbitrators.

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary

arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure.

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings; *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered.

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators.

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his

interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses.

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies.

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) Compensation of assistants to board of arbitration; expenses; quarters.

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing be-

fore the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

Railway Labor Act, §8, 44 Stat. 584 (1926), as amended 45 U.S.C. §158 (1964)

§158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation.

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or

awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts deter-

mined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

Railway Labor Act, §9, 44 Stat. 585 (1926), as amended 45 U.S.C. §159 (1964)

§159. Award and judgment thereon; effect of chapter on individual employee.

First. Filing of award.

The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office

of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award; judgment.

An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Impeachment of award; grounds.

Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided, further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial ir-

regularity or clerical error, going only to form and not to substance.

Fourth. Effect of partial invalidity of award.

If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. Appeal; record.

At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of court of appeals.

The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained.

If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when en-

tered shall have the same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit.

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Railway Labor Act, §201, 49 Stat. 1189 (1936)

Carriers by Air

§181. Application of sections 151, 152, and 154-163 to carriers by air.

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Railway Labor Act, §204, 49 Stat. 1189 (1936)

§184. System, group, or regional boards of adjustment.

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Railway Labor Act, §205, 49 Stat. 1190 (1936)

§185. National Air Transport Adjustment Board.

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of sections 151-163 and 181-188 of this title, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of

the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of sections 181-188 of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. BALL and R. E. LEE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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OCTOBER TERM, 1967

No. 304

NORTHWEST AIRLINES, INC.

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. RALL and R. E. LEE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Question Presented

In a suit for enforcement against an airline of a non-money award duly rendered by a System Board of Adjustment created pursuant to §204 of the Railway Labor Act by an agreement between the airline and the union, which agreement provides that the Board's award is to be final, binding, and conclusive upon the parties, must the airline be accorded a *de novo* determination by the District Court of the merits of the dispute?

Statement of Case

Petitioner's statement of the case is unacceptable, as it contains irrelevant matters and argument and is incomplete.

On February 8, 1964, Northwest Airlines, Inc. (NWA) discharged pilots David G. Rall and R. E. Lee; Rall for violation of a rule prohibiting use of alcoholic beverages within 24 hours before flying as a crew member, and Lee for flying as a second pilot with Rall while the latter had an apparent physical deficiency (R. 18, 22).

Rall and Lee disputed their discharges, processing their grievances through the procedures established by contract between NWA and the Air Line Pilots Association (ALPA), each ultimately appealing to a five-man System Board of Adjustment established under contract provisions between NWA and ALPA pursuant to §204 of the Railway Labor Act, 49 Stat. 1189 (1936), 45 U.S.C. §184, which provides in relevant part:

> "It shall be the duty of every carrier and of its employees, * * * to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

The agreement between NWA and ALPA (R. 5-11) provides that in compliance with the section just quoted, "there is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Pilot's Agreement and which are properly submitted to it" (R. 5). It further provides:

> "(l) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.
>
> "(m) * * * a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 9).

The Railway Labor Act, §3, First, 48 Stat. 1189 (1934), 45 U.S.C. §153, First (prior to Amendments, 80 Stat. 208 (1966)), provided in relevant part:

> "(m) * * * [T]he awards [of the Adjustment Board] shall be final and binding upon both parties to a dispute, except insofar as they shall contain a money award * * *."
>
> * * * * *
>
> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court * * * a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *."

In each case, the Board duly heard and considered the evidence (R. 79-695), determined that discharge was too severe a sanction under the circumstances, and ordered reinstatement (R. 20, 23).

NWA refused to comply with these orders; accordingly, on February 10, 1965, ALPA, Rall and Lee petitioned the United States District Court to enforce them (R. 1). On January 6, 1966, they moved for summary judgment (R. 62)[1], which was granted on March 7, 1966 (R. 63). This action was affirmed by the Court of Appeals for the Eighth Circuit on February 23, 1967, 373 F. 2d 136, Peti-

1. This was the second motion for summary judgment. The first, filed April 6, 1965, (R. 33), was denied on August 6, 1965 (R. 46), and leave to take an interlocutory appeal from such denial was denied by the Court of Appeals on October 13, 1965 (R. 59).

tion Appendix A 47, and NWA's petition for a rehearing was denied on March 30, 1967. NWA seeks from this Court a writ of certiorari.

NWA's position in the courts was that, notwithstanding the clear language of the agreement that the Board's decision was to be "final, binding and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 9), it should be accorded a *de novo* hearing on the dispute in District Court. Essentially, NWA argues for *de novo* trial because §204 of the Railway Labor Act provides that the Board's jurisdiction not exceed that provided for boards operating under the authority of §3 of the same act, and §3, in addition to providing that the board's decision "shall be final and binding upon both parties" (§3, First (m)), provides that a suit for compliance in District Court "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *." (§3, First, (p).) See District Court opinion (R. 67). In sum, NWA has urged that to give the agreement literal construction would be to violate the requirement of §204 that the Board's jurisdiction not exceed that provided in §3. It has made no other real claim.

ARGUMENT

Introductory Statement

Certiorari should be denied because none of the reasons for reviewal on a writ of certiorari enumerated in Supreme Court Rule 19 are present:

> (1) The Court of Appeals has not rendered a decision in conflict with the decision in another court of appeals on the same matter. Rather, it has rendered one in accord with all the decisions of the courts of appeals (and district courts) rendered subsequently to the controlling decision by this Court, *Gunther* v. *San Diego & A. E. Ry.* 382 U. S. 257 (1965).
>
> (2) The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court. Rather, it has followed the decision of this Court in *Gunther* v. *San Diego & A. E. Ry., supra.*
>
> (3) The Court of Appeals has not decided a federal question in conflict with applicable decisions of this Court. Rather, it has followed such decisions.[2]

Briefly stated, Respondents' positions are that:

> 1. The federal question was not decided in conflict with applicable decisions of this Court.
>
> (2) The federal question (a) has been settled by decisions of this Court; or if it has not been settled, (b) it is not an important question of federal law;

2. Petitioner does not claim that the Court of Appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law" or that it "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

and/or (c) it need not and should not be treated by this Court at this time.

3. There is presently no conflict between any courts of appeal as to the federal question.

1. Extraneous matters included in Petition becloud the real issue herein.

It is essential to clarity that several matters be disposed of at the outset. The first is Petitioner's claim that the District Court and the Court of Appeals herein determined the question of the finality of the Board's award "not on the basis of the contract between the parties, but on the basis of an interpretation of §3 of the Railway Labor Act." This claim appears at various places in the petition.[3]

Petitioner's claim that the District Court and the Court of Appeals paid no heed to the effect of the agreement are without the slightest merit. The District Court opinion states as follows:

> "Neither is there any showing which would justify a finding that the Air Line Pilots Association and the Northwest Airlines contracted with each other in the belief and understanding that the decisions of the Board would not be complete and irrevocable. It may be noted that the contract between Northwest Airlines and the Air Line Pilots Association provided that the System Board of Adjustment's decisions shall be final and binding" (R. 68).

The Court of Appeals opinion states as follows:

> "The agreement provides that a decision can be made by a majority of the Board members and that

3. See Petition 6, 15, 16-17; c.f. Petition 13 (assertion that contractual provisions broadening scope of judicial review are permissible under *Gunther*).

the Board's decision on matters properly referable to it 'shall be final and binding upon the parties.' * * *

* * * * *

"In our present case, the award was made by a System Adjustment Board created by contract pursuant to statutory authority found in 45 U.S.C.A. §185. Under the latter section airline employees and labor representatives are authorized and directed to establish by contract System Boards of Adjustment having jurisdiction not exceeding that of §153 boards. It is conceded that jurisdiction equal to that of §153 boards may be established.

"As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings" (Petition Appendix A 40, 43).[4]

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4. Petitioner argues that the language of the agreement "was selected in the light of the then known NRAB 'degree of finality' decisions, viz. *nine* pre-1952 cases interpreting §3 of the Act as requiring a full *de novo* review of NRAB awards." Petition 26. This argument certainly is inconsistent with its claim that §3 is "expressly inapplicable" to air carriers (see Petition 6, 10, 11, 16, 27). Moreover, it is utterly without merit.

First, it should be pointed out that, as shown in the discussion in §3 of this brief, *infra*, there are not nine pre-1952 cases holding that §3 requires a *de novo* review of NRAB awards. Prior to 1952, there were two Court of Appeals cases affirming denials of enforcement on the basis of a full *de novo* review and four district court cases according the employer *de novo* review. In the district court cases, the holdings were far from crucial—in three of them the employee received all of the benefits conferred by the award, and in the other, the ruling was made in a pre-trial order, so that it is not apparent whether the employee received all the benefits sought. None of the decisions was by the Court of Appeals for the Eighth Circuit or the District Court for the District of Minnesota.

Secondly, it is plain that if the parties contemplated that *de novo* review was to be possible, they would have said so, rather than agreeing that awards be "final and binding upon the *parties* hereto." [Emphasis supplied.]

All of this compels the conclusion that the Court of Appeals herein was absolutely correct when it stated:

> "As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings.

Related to the foregoing is another barrier to clarity which must be removed in order to see the real issue. Petitioner recurrently refers to §3 being "expressly made inapplicable to carriers by air." See Petition 6, 10, 11, 16, 27. The provision it uses in support of that statement does not state that §3 of the Railway Labor Act, (45 U.S.C. §153) is inapplicable to air carriers, but rather that certain other provisions *are* applicable.[5] As noted above, §204 of the Railway Labor Act, under which the Board herein was created by agreement, provides that such a board shall have "jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of Section 153 of this title." This unequivocally makes §3 of the Act applicable to §204 boards for the purpose of determining whether their jurisdiction exceeds that of §3 boards.

Still another beclouding matter, related to those just mentioned, is presented by Petitioner's references to some type of imagined, but unarticulated, difference between air carrier boards and railroad boards.

At page 13 of the petition it is contended that "until NATAB [National Air Transport Adjustment Board,

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NWA argues that prior to *Gunther de novo* review existed under the circumstances here presented and that the parties by their contract could give the Board no greater power than existed by law in a §153 Board. We believe such argument is based on a false premise. *Gunther* interprets the statutory law as it has at all times here materially existed and does not purport to change any previous authoritative Supreme Court decision interpreting the statutory provisions with respect to the scope of review of a board's nonmonetary award" (Petition Appendix A 40, 43).

5. "All of the provisions of Sections 151, 152 and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce * * *" Railway Labor Act, §201, 49 Stat. 1189 (1926), 45 U.S.C. §181.

authorized by §205 of the Railroad Labor Act, 49 Stat. 1190 (1936), 45 U.S.C. 185] is created, Airline System Boards may have decisional finality power of a lesser degree than NATAB." Section 205 does provide that NATAB, when created, shall have the power and duties prescribed by §3 for the National Railroad Adjustment Board. But §204 provides that boards such as that in the present case shall have jurisdiction "not exceeding" that provided in §3, and the agreement herein provides for jurisdiction to the limits of §3.

In a similar vein, Petitioner cites ten cases decided in the courts of appeal and district courts for the proposition that there is confusion surrounding the issue of the finality to be accorded awards of airline system boards. See Petition 8 n. 9, n. 10. None of these decisions contains the slightest indication that airline boards are to be treated in any way differently from railroad adjustment boards. Moreover, despite the fact that all the cases cited preceded *Gunther*, they do not indicate any confusion as to the question in the present case. The simple reason for this is that nine of them do not *involve* the present question, and the one decision which *does* involve the point determines it adversely to Petitioner's position.

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6. Five of the cases hold that an employee cannot appeal the merits of an adverse Board decision. *Woolley* v. *Eastern Airlines, Inc.*, 250 F. 2d 86 (5th Cir. 1957), *cert. den.* 356 U. S. 931 (1958); *Sigfred* v. *Pan American World Airways, Inc.*, 230 F. 2d 13 (5th Cir. 1956), *cert. den.* 351 U. S. 925 (1956); *Bower* v. *Eastern Airlines, Inc.*, 214 F. 2d 623 (3d Cir. 1954), *cert. den.* 348 U. S. 871 (1954); *Hartley* v. *Pan American Airways, Inc.*, 98 F. Supp. 247 (N.D. Cal. 1951); *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907 (W.D. Wash. 1953). In *Edwards* v. *Capital Airlines, Inc.*, 176 F. 2d 755 (D. C. Cir. 1949), *cert. den.* 338 U. S. 885 (1949), the court held that *employees* who are not members of the union might not be completely bound by the Board award where the union, which is represented on the Board, has an interest hostile to such employees and the company, also represented on the Board, is neutral on the matter. In *American Airlines, Inc.* v. *Air Line Pilots Assn.*, 91 F. Supp. 629 (E.D.N.Y. 1950), a carrier was denied summary

In *Capitol Airways, Inc.* v. *Airline Pilots Association,* 341 F. 2d 288 (6th Cir. 1965), *cert. den.* 381 U. S. 913, 952 (1965), the court rejected the propriety of the district court's making a *de novo* determination and held that the award is to be enforced if the collective bargaining agreement is susceptible of the interpretation placed upon it by the Board. Petitioner's attempt to fault the decision on the ground that the court "confused System Boards with Boards of Arbitration" (Petition 9) is certainly hollow in light of this Court's statement in *Gunther* that the board decision is to have "the same finality that a decision of arbitrators would have," and that "the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field.' " 382 U. S. at 263-64.

The agreement between Petitioner and ALPA provided for jurisdiction to the full extent of §3 of the Railway Labor Act. Both were created pursuant to provisions of the Railway Labor Act, the purpose of which regarding "minor" disputes of the type here involved is "to provide for the prompt and orderly settlement" thereof. Railway Labor Act, §2, 44 Stat. 577 (1926), 45 U.S.C. 151a. The possible effect of some awards upon safety is present in regard to both, and there is no reason to doubt that both boards weigh the "safety factor" carefully.

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judgment because there was a question of fact as to the meaning of the Board's decision. In only two of the suits was the employee seeking enforcement unsuccessful, and in each one it was for a reason completely unrelated to the present question. In *Bates* v. *Northwest Airlines, Inc.,* 171 F. Supp. 273 (D. Minn. 1959), the employee failed because there was no board order directed to the employer commanding it to make payment. In *Arnold* v. *United Airlines, Inc.,* 296 F. 2d 191 (7th Cir. 1961), it was because the board lacked jurisdiction because the appeal to it had not been timely.

2. The federal question herein was not decided in conflict with applicable decisions of this Court.

Putting aside for the moment the fundamental fact that the federal question herein was settled by this Court in *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 (1965), it is abundantly clear that the Court of Appeals' decision is not in conflict with any decision of this Court.

Petitioner by tortuous reasoning attempts to show that the decision conflicts with *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Petitioner posits a strange argument that the meaning of *Central Airlines* is unclear, and that whatever the meaning of that case is, the District Court and the Court of Appeals below did not follow it (Petition 16). This argument is plainly fallacious. There is no ambiguity in the *Central Airlines* case, and the District Court and the Court of Appeals herein completely followed it. This Court unequivocally held in *Central Airlines* that an agreement made pursuant to §204 of the Railway Labor Act, the relevant words of which were *identical* to those of the agreement involved herein, *compare* 372 U. S. at 683, *with* R. 5, 9, was "a federal contract and is therefore governed and enforceable by federal law, in the federal courts," 372 U. S. at 692, and that "it is federal law which would determine whether a §204 contract is valid and enforceable according to its terms." 372 U. S. at 691. The District Court and the Court of Appeals merely carried out the mandate of this Court that such a contract is a federal contract and that the courts' function was to determine whether it was enforceable according to its terms.

Petitioner states that the court in *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1941), *aff'd by an*

equally divided court, 319 U. S. 732 (1943), held that a district court must conduct a *de novo* review of an award of a Railroad Adjustment Board. (Petition 18) It held no such thing, as is abundantly clear from the court's own statement:

> "[T]he issue is whether a carrier, which has been unsuccessful before the Board, can maintain a suit for a declaratory judgment of rights under the original collective [bargaining] agreement during the two years which the Act allows for the employee's enforcement suit. We think the answer should be negative, and therefore the District Court was right in dismissing the complaint of the carrier, appellant here." 124 F. 2d 238.

The court so held because allowing the company in such a situation to bring a declaratory judgment action would rob the employees of the effect of the Board determination. It was not necessary for the court to decide precisely what the effect of the Board determination was, but only to decide, as it did, that the award did have legal effect. The *Washington Terminal* opinion did contain dicta as to the precise effect of the Board determination. But such dicta certainly cannot be considered approved by the equally divided memorandum affirmance in this Court.[7]

It is completely unnecessary at present to reconsider the question of whether the employees could have chosen to proceed by means of the state courts rather than through the procedures culminating in the Board decision. See *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653 (1953); *Moore* v. *Illinois Central R. R.,* 312 U. S. 630

7. Where a decision is affirmed by an equally divided court, the judgment is without force as precedent. *Ohio ex rel. Eaton* v. *Price,* 264 U. S. 263, 264 (Opinion of Brennan, J.).

(1941); *Walker* v. *Southern Ry.*, 385 U. S. 196 (1966). The employees chose the latter course. The reason there should be a difference in the scope of matters considered by the trial court in a suit for wrongful discharge and in one for enforcement of a Board order is obvious—this result is required by the agreement which was made pursuant to §204 of the Railway Labor Act. There is nothing "confusing" (Petition 13) about this at all.

Petitioner contends that Railway Labor Act, unlike the Interstate Commerce Act, provided the same method of enforcement of both money and non-money awards (Petition 21). This assertion was fully answered by this Court in *Gunther*, in holding that §3 of the Railway Labor Act dictates that "though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of the money award." 382 U. S. at 264.

In *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U. S. 33 (1966), this Court clearly showed that it had not yet considered the problem here involved, and presaged *Gunther*. This Court held that money awards could be reviewed, and stated, "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m)." 373 U. S. at 40.

Petitioner posits as a reason for review of this case that *Gunther* has been erroneously applied by the courts—thus adhering to its tortured refusal to believe the clear impact of *Gunther* and claiming that all the federal courts facing the question since *Gunther* are wrong in their interpretation of *Gunther*, and that it alone is right.

Petitioner cites as the "several courts" it fears are misguided: *Hanson* v. *Chesapeake & O. Ry.*, 367 F. 2d 134 (4th Cir. 1966); *Hodges* v. *Atlantic Coast L.R.R.*, 363 F. 2d

534 (5th Cir. 1966); *Taylor* v. *Hudson Rapid Tubes Corp.*, 362 F. 2d 748 (3d Cir. 1966); *Brotherhood of R.R. Signalmen* v. *Southern Ry.*, 254 F. Supp. 564 (M.D.N.C. 1966); and *Barrett* v. *Manufacturers Ry.*, 254 F. Supp. 376 (E.D. Mo. 1966). All of these cases held that an employer is not entitled to a *de novo* determination in a suit to enforce a non-money award. Petitioner has neglected to mention that the first case cited, *Hanson,* was decided upon summary remand from this Court. See 384 U. S. 211 (1966), *vacating and remanding* 351 F. 2d 953 (1965). In accord with the foregoing cases are the following additional cases: *Raabe* v. *Florida East Coast Ry.*, 259 F. Supp. 351 (M.D. Fla. 1966); *Brotherhood of R.R. Signalmen of America* v. *Southern Ry.*, 254 F. Supp. 569 (M.D.N.C. 1966). No post-*Gunther* case even *suggesting* a contrary result has been found.

Nor do the courts facing disparate problems which cite *Gunther* appear to have any difficulty in determining its meaning. *Leeds & Northrop Co.* v. *NLRB,* 357 F. 2d 527, 532 (3d Cir. 1966) ("There are, of course, certain instances when definitive administrative action is final and not within the ambit of judicial review"); *St. Regis Paper Co.* v. *Jackson,* 369 F. 2d 136, 142 n. 13 (5th Cir. 1966) ("Curtailment of the right of review has been upheld in at least one other area of the law,where there were justifiable reasons for the curtailment"); *In re Certain Carriers,* 253 F. Supp. 523, 534 (D.D.C. 1966) ("Only recently the Supreme Court held that an award of the National Adjustment Board is not only final and binding but may be enforced judicially").

3. (a) The federal question herein has been settled by decision of this Court.

Gunther v. *San Diego & Arizona E. Ry.*, 382 U. S. 257 (1965) is completely dispositive of the question herein, and was in all respects followed by the District Court and the Court of Appeals herein.

Gunther involved a dispute in which the carrier removed an engineer from his employment for alleged physical disability. The carrier's action in removing Gunther was based upon reports by its physician that Gunther was no longer physically qualified to work as a locomotive engineer because, as the carrier put it, his "heart was in such condition that he would be likely to suffer an acute coronary episode." 198 F. Supp. 402, 405 (S.D. Calif. 1961). After removal from service, Gunther had an examination by his own physician—a "specialist"—who concluded that he was physically qualified to continue work. Based on this difference of "opinion," Gunther requested the carrier to select a three-doctor board for re-examination of his physical adequacy, and the carrier refused. Gunther then filed a claim for reinstatement and back pay with the Railroad Adjustment Board. The Board took jurisdiction (over the protest of the carrier), relied on past practice, and proceeded to appoint a committee of three physicians to re-examine Gunther. The panel of physicians rendered a majority decision that Gunther was physically qualified to continue work. On the basis of this finding, the Railroad Adjustment Board found Gunther to have been wrongfully discharged and ordered his reinstatement with back pay. The carrier refused to comply with the Board's order.

Gunther then petitioned in federal district court for an order enforcing the Railroad Adjustment Board's award.

On a motion for summary judgment by the carrier, the district court held the award erroneous and refused to enforce it. 198 F. Supp. 402 (S.D. Calif. 1961). Its holding was based upon the conclusion that the collective bargaining agreement between the Brotherhood of Locomotive Engineers and the carrier did not limit the "right" of the carrier to remove Gunther from active service because of physical disability. The district court made a lengthy examination of the collective bargaining agreement and concluded that:

> "The carrier here exercised a right which it had not surrendered by the act of executing a collective bargaining agreement, or by virtue of its terms." 198 F. Supp. at 418.

The Court of Appeals of the Ninth Circuit affirmed. 336 F. 2d 543 (1965). After indicating that the responsibility for physical competence must rest with the carrier, the court stated:

> "In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it." 336 F. 2d at 547.

Both the district court and the court of appeals ruled that the issues in the enforcement proceedings were to be tried *de novo*. The district court, using Petitioner's present reasoning, said:

> "When the award is unfavorable to the employee, the Board's decision is final * * * [citing cases]. When it is unfavorable to the carrier, the decision may not be enforced except as to the court orders, after an enforcement suit is brought by the employee. The Court hears the case *de novo* and may

> enforce or set aside the Board's decision." 198 F. Supp. 407, n. 3.

See also 198 F. Supp. 410, n. 7. The court of appeals said:

> "Appellant contends that the determination of this dispute by the Adjustment Board and its decision to entertain the dispute should be accepted by this Court under the arbitration-encouraging rules laid down in the [Steelworker] cases * * * and decisions of like import.
>
> "We do not find that line of authority in point. Those cases arose under §301 of the Labor Management Relations Act * * * and dealt with arbitration provisions of collective bargaining agreements." 336 F. 2d at 547-48.

The court of appeals then reasoned that since the proceeding arose under the Railway Labor Act,

> "It would seem apparent that Congress intended that courts should have full power to review the question whether a dispute as defined by Congress (rather than by the parties themselves) exists." 336 F. 2d at 548.

On certiorari, this Court reversed both courts and remanded. In Part III of the opinion this Court deals directly with the issue involved in the present case and in the clearest possible language totally and completely rejects the contention accepted by the lower courts and presently urged by the Petitioner herein. This Court first defined the question of the scope of review to be exercised by the lower court on remand and clearly indicated that non-money awards are governed by §153, First (m):

> "Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall

> contain a money award.' The award of the Board in this case, based on central findings that petitioner was wrongfully removed from service is two-fold, consisting both of an order of reinstatement and the money award for lost earnings. *Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job* merely because one part of the Board's order contained a money award." [Emphasis supplied.] 382 U. S. at 263.

In four words, this Court established without qualification the applicable rule of law that governs the present case:

> *"We hold it cannot."* [Emphasis supplied.] *Ibid.*

It is difficult to visualize the language which would convince Petitioner that this Court seriously meant to prevent relitigation of the non-money award in federal court. "We hold it cannot" is not inadvertent. It is not dictum. It is certainly not unintended. This Court, in strong, precise and uncompromising language, stated exactly what it meant to say. It emphatically laid to rest any doubt as to its interpretation of the finality of non-money awards under the Act:

> "The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. *The basic grievance here*—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—*has been finally, completely and irrevocably settled by the Adjustment Board's*

> *decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the "District Court."* [Emphasis supplied.] 382 U. S. at 264.

As in *Gunther,* the "basic grievance" in the present litigation is that the employees have "been wrongfully removed from active service." As in *Gunther,* the System Adjustment Board in the present case found them to be wrongfully discharged and ordered reinstatement with back pay. As in the *Gunther* case, the carrier refused to comply with the awards, and enforcement proceedings were commenced in federal court under §153, First (p). As in *Gunther,* the employees' rights to reinstatement "[have] been *finally, completely and irrevocably* settled by the Adjustment Board's decision." The District Court was unquestionably correct in its conclusion that:

> "The factual differences between Gunther and the instant proceeding do not suggest that there should be any different interpretation of the Act" (R. 69).

Respondents agree with the District Court that the *Gunther* case is dispositive of the issue and that it had "no alternative but to follow the teachings of *Gunther*" (R. 69).

Petitioner's only attempt to distinguish *Gunther* is its assertion that *Gunther* involved "contract interpretation" rather than an "issue of fact" (Petition 33). This analysis is faulty for two reasons:

(a) *Gunther* and the present case involve "contract interpretation" to an identical degree. The question in *Gunther* was whether the district court could review on the merits of the Board's determination that the company's dismissal of an employee on the ground that the likeli-

hood he would suffer a heart attack made him unfit for services as an engineer was unwarranted by the collective bargaining agreement; the question in the present case is whether the District Court could review on the merits the Board's determination that the Company's dismissal of an employee on the ground that his conduct in flying within 24 hours after consuming an alcoholic beverage (or in knowingly flying as a co-pilot with one who has committed such conduct) made him unfit for services as a pilot was unwarranted by the collective bargaining agreement. The only dissimilarity is that in *Gunther* the company's reason for dismissal was an engineer's susceptibility to heart attack, while in the instant case it is a pilot's conduct in flying within 24 hours after drinking (and a co-pilot's conduct in knowingly flying with one who has committed such conduct). If anything, it would seem that the company should be given more leeway in the former situation, since the asserted danger was physical and not capable of remedy, as opposed to the situation here, where it is past conduct, repetition of which can be prevented by disciplinary suspension (which the Board in fact provided, see R. 20 (Rall, 7 months), 24 (Lee, 2 months)).

Moreover, there was more a "fact" issue in *Gunther* than in the present case; in *Gunther,* it was disputed whether the employee had susceptibility to heart attack; in the instant case, there is no dispute as to the fact that the employees committed the conduct complained of, and the only question is whether such conduct under the circumstances warranted discharge.

(b) Even it if were true that the present case involves more "issue of fact" and less "contract interpretation" than *Gunther,* Petitioner certainly proposes a novel rule of

law when it contends that determinations of "fact" issues should be subjected to more intensive judicial review than "contract interpretations." If anything, the rule would be the contrary.

In fact, it is plain that neither *Gunther* nor the statute construed therein is grounded upon such considerations. Rather, *Gunther* holds that duly obtained Board findings and orders, regardless of the relative amounts of "fact" determination and "contract interpretation" involved, are final and binding upon the parties.

The matters put forth by Petitioner in avoidance of this obvious fact are completely without merit, but they will be examined in turn.

(1) *"Curiosities."* Petitioner asserts that *Gunther* yields several "curiosities" if it rejects *de novo* review.

(a) *Non-Use of Phrase "De Novo."* Petitioner seizes upon the fact that the *Gunther* opinion nowhere refers to the phrase *"de novo."* It is "curious" that Petitioner would require this Court to use that phrase in view of the fact that the Railway Labor Act under consideration does not employ it. Reading the opinion as a whole, there can be no doubt that regardless of phraseology, this Court intended to preclude *de novo* review. It is "curious" to attach significance to the non-use of the term *"de novo"* review in an opinion which specifically states that the district court may not "open up the Board's finding on the merits," that Congress intends to "foreclose litigation in the courts over grievances submitted to and disposed of by the Board," that the district court may not "review an Adjustment Board's determination of the merits of the grievance," that the grievances were "finally, completely and irrevocably settled by the Adjustment Board's decision," and that "the merits of the wrongful removal issue

as decided by the Adjustment Board must be accepted by the District Court." See 382 U. S. at 263, 264.

(b) *Failure to Refer to Certain Dissenting Opinions.* Petitioner claims that if this Court meant what it unequivocally said in *Gunther,* mention should have been made of certain dissenting opinions which it feels are inconsistent with the result in *Gunther;* thus, it urges that "Only this Court can tell whether those views are overruled in *Gunther* without any mention whatsoever," and that "Justice Black, speaking for this Court, has not changed his previous opinion in dissent." These claims are devoid of merit.

Perhaps if the result reached in *Gunther* had been opposed to the prior position of Justices Black and Douglas, as Petitioner erroneously suggests in referring to an "overruling" of the prior views and a "change" of opinion, there might be some reason to suppose that the dissenting opinions would have been cited. But the result in *Gunther* was not opposed to the prior position of either justice. In *Pennsylvania R. R.* v. *Day,* 360 U. S. 548 (1959), a retired railroad employee sued in federal district court for extra compensation he claimed was due under a collective bargaining agreement. The court stayed the proceedings pending the disposition of similar claims before the National Railroad Adjustment Board. The issue was whether the employee was entitled to proceed before the district court, bypassing the Adjustment Board. This Court held that he was not, as the Board had exclusive primary jurisdiction, notwithstanding the fact the employee was retired. Justice Black, joined by the Chief Justice and Justice Douglas, dissented on the grounds that a *retired* employee is not an "employee" within the meaning of the Labor Act provision requiring submission of disputes to the Board, and that the majority construc-

tion apparently resulted in an inequality between the position of the employee and that of the employer. Justice Black described the inequality as follows:

> "[W]hen the Board makes an award adverse to the railroad and the employee is forced to go to the courts to have the award enforced, courts *have felt free* to interpret collective bargaining agreements differently from the way the Board had. [Citing court of appeals cases.]
>
> * * * * *
>
> "[C]ourts, determining that a Board denial of the employee's money claim is not a 'money award' falling within the exception of §3 First (m), *have refused* workers a judicial trial of their *money claims* against the railway after these have been rejected by the Board. Today's decision in *Union Pacific R. Co.* v. *Price,* 360 U. S. 601, 3 L. Ed. 2d 1460, 79 S. Ct. 1351, appears to adopt this position. In contrast, however, a railroad may obtain a trial substantially de novo of any award adverse to it.
>
> * * * * *
>
> *"Construed this way,* the Act creates a glaring inequality of treatment between workers and railroads." [Emphasis supplied.] 360 U. S. 556-57, 558, 559.

In *Union Pacific R. R.* v. *Price,* 360 U. S. 601 (1959), this Court held that an employee could not pursue a common law remedy for damages from wrongful discharge after an adverse determination of the Adjustment Board. Justice Douglas, joined by the Chief Justice and Justice Black, dissented, noting the inequality of treatment in allowing an employer review of a *money award* and denying an employee review of an award of no damages.

> "Respondent argues that *it would be* grossly unfair to construe §3 First (m) so as to deny judicial review to a defeated employee but not to a defeated

> railroad. *That would indeed be the result* if an employee asserting a *money claim* cannot get court review if he loses, while the employer can obtain it if the employee wins. It is difficult for me to believe that Congress designed and approved such a lopsided, preferential system." [Emphasis supplied.] 360 U. S. 619.

All that the *Day* and *Price* dissents show is that the writers thereof considered it inequitable that *de novo* review be refused to the employee for denial of a *money claim* while it is granted to the employer for *money awards*. The holding of *Gunther*, that review of non-money awards denied to the employer as it is to the employee, is certainly not inconsistent.[8] Even if there were any inconsistency, the plain language used by Justice Black in *Gunther* should more than satisfy the Petitioner's "curiosity."

(c) *Failure to Cite Certain Lower Court Decisions.* Petitioner asserts as another "curiosity" that the *Gunther* opinion fails to mention "the overwhelming number of decisions which uniformly hold that a trial *de novo* is required in an NRAB enforcement proceeding" (Petition 28). In the first place, even if there were an "overwhelming" number of lower court decisions requiring trial *de novo*, there is no reason why this Court would have had to refer to them in light of the plain and concise language of *Gunther*. But there is no such "overwhelming" number of decisions. Page 17, note 15, of the petition sets forth sixteen cases which Petitioner claims "have held that NRAB enforcement suits proceed *de novo*." An examina-

8. It should be noted that Justice Black felt that certiorari should have been granted in an earlier case allowing *de novo* review of a non-money award. See *Brotherhood of R. R. Trainmen* v. *Louisville & Nashville R.R.*, 334 F. 2d 79 (5th Cir. 1964), *cert. den.* 379 U. S. 934 (1964). He also favored granting the petition for rehearing. *Id.* 379 U. S. 986 (1965).

tion of these cases reveals that in two of them the question of *de novo* review was in no way involved. *Hodges* v. *Atlantic C.L.R.R.*, 310 F. 2d 438 (5th Cir. 1962) (reversed dismissal of suit to enforce award, which dismissal was on grounds award was not sufficiently definite); *Kirby* v. *Pennsylvania R.R.*, 188 F. 2d 793 (3d Cir. 1951) (same). Two other cases contain absolutely no holding as to *de novo* review, but do contain dicta as to that matter. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, *affirmed by an equally divided court*, 319 U. S. 732 (1943) (employer may not maintain suit for declaratory judgment of rights under collective bargaining agreement during two years allowed for employee's enforcement suit); *Order of Railroad Telegraphers* v. *Union Pacific R.R.*, 231 F. Supp. 33 (D. Colo. 1964) (employees in favor of whom award was made are indispensible parties to union's suit to enforce award). In three cases, the courts did require a *de novo hearing*, but that action was not a crucial holding in light of the fact that the court in each case ruled that the employee seeking enforcement of the award was entitled to all benefits conferred by the award. *Ward* v. *New Orleans Public Belt R.R. Commn.*, 97 F. Supp. 1002 (E.D. La. 1951), *affirmed*, 195 F. 2d 829 (5th Cir. 1952); *Crist* v. *Public Belt R.R. Commn.*, 93 F. Supp. 103 (E.D. La. 1950); *Hanks* v. *Delaware & H. R. Corp.*, 63 F. Supp. 161 (N.D.N.Y. 1945). In another case, the ruling was made in a pre-trial order, so that it is not apparent whether the employees received all the benefits sought. *Order of Sleeping Car Conductors* v. *Pullman Co.*, 47 F. Supp. 599 (E.D. Wis. 1942). In three other cases, judgments in favor of railroads were affirmed, but not on the basis of the type of review claimed by Petitioner. *Jones* v. *Central of Georgia Ry.*, 331 F. 2d 649 (5th Cir. 1964) (employee estopped to proceed before Board for reinstatement with back pay

because he had previously recovered in state court for past, present and future wages from railroad on ground he was permanently disabled and unable to work in his employment); *Callan* v. *Great Northern Ry.*, 299 F. 2d 908 (9th Cir. 1961) (involved question whether award was obtained through fraud); *Boos* v. *Railway Express Agency*, 253 F. 2d 896 (8th Cir. 1958) (affirmed summary judgment—court specifically stated there was no issue as to effect to be given findings and order of Adjustment Board). Only five cases appear to involve the type of review sought by Petitioner. *Brotherhood of R.R. Trainmen* v. *Louisville & N.R.R.*, 334 F. 2d 79 (5th Cir. 1964), *cert. den.* 379 U. S. 934 (1964); *Brotherhood of Railway Clerks* v. *Atlantic Coast Line R.R.*, 253 F. 2d 753 (4th Cir. 1958); *Thomas* v. *New York, C. & St. L. R.R.*, 185 F. 2d 614 (6th Cir. 1950); *Dahlberg* v. *Pittsburg & L.E. R.R.*, 138 F. 2d 121 (3d Cir. 1943); *Hanson* v. *Chesapeake & O. Ry.*, 236 F. Supp. 56 (S.D. W. Va. 1964). For some reason, Petitioner has neglected to include in its citation to the last-mentioned case the very significant subsequent history. After affirmance by the Court of Appeals for the Fourth Circuit, 351 F. 2d 953, the case was summarily vacated and remanded for "further consideration in light of *Gunther* v. *San Diego & A.E.R. Co.*," 384 U. S. 211 (1966). On remand, 367 F. 2d 134 (4th Cir. 1966), the Court of Appeals without hesitation adopted precisely the same approach as the District Court and the Court of Appeals in the present case.

(d) *Failure of Gunther Parties to Argue Point.* Petitioner makes much of the fact that the employee in *Gunther* did not assert that the carrier was not entitled to *de novo* review. It is well established that this Court may decide a case upon a ground not put forth by the parties,

see *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938), and the *Gunther* opinion makes very clear the ground upon which the case was decided. As Petitioner concedes, the issue was raised in an *amicus* brief, and the issue (and many of the relevant cases) was discussed in the *Gunther* district court and court of appeals opinions. See 198 F. Supp. at 407 nn. 3, 4, 410 n. 7; 336 F. 2d at 547-48.

(2) *Cases Cited in Gunther.*

The argument in Petition 30-33 is apparently premised upon the belief that *Gunther* cannot foreclose *de novo* review because prior decisions of this Court cited in the opinion do not do so. Petitioner overlooks, however, the fact that *Gunther* was the first case before this Court which sought enforcement of an award under Section 153, First (p.) With the precise issue before this Court for the first time, it is not surprising that the cases cited are amenable to distinction. Regardless of those prior cases, *Gunther* holds judicial review of the type Petitioner seeks to be prohibited, and that holding, even were it standing without any prior judicial support, would be completely effective.

(3) *Terms of the Statute.*

Contrary to Petitioner's assertion, the decisions of the courts herein are completely in accord with the governing statute, both as it existed before the recent amendment, and since. The purpose of the statute, with regard to "minor" disputes of the type involved here, is to "provide for the prompt and orderly setlement" thereof, Railway Labor Act, §2, 44 Stat. 577 (1926), 45 U.S.C., §151a.

Before amendment, §3, First (m) provided that the Board's awards "shall be final and binding upon both parties to a dispute, except insofar as they shall contain a

money award." Section 3, First (p)'s provision that the Board's findings and order "shall be prima facie evidence of the facts therein stated, which provision is the only real basis for all of Petitioner's contentions, applied only to the issue of "the size of the money award." *Gunther* v. *San Diego & A. E. Ry.*, 382 U.S. 257, 264.

(4) *Subsequent amendment of Section 3, First.*

Petitioner argues that the recent amendment of §3, First (80 Stat. 208 (1966)), eliminating the paragraph (m) exception relating to money awards and changing the paragraph (p) phrase "shall be prima facie evidence of the facts therein stated" to "shall be conclusive on the parties" shows that the provisions before amendment required *de novo* review of non-money awards, because of the rule of statutory construction that Congress, in adopting an amendment, intended to make some change in existing law. This assertion compels the conclusion that Petitioner has misread the amendment or *Gunther*, or both. The *Gunther* decision denied judicial review to enforcement proceedings involving "non-money" awards and does not purport to eliminate review in cases of money awards. The amendment does not purport to effect non-money awards, but instead eliminates the distinction between non-money and money awards and makes both classes of awards final and conclusive in enforcement proceedings. This Congressional action, therefore, in no way impinges upon *Gunther's* effect on the present case.

Moreover, Petitioner's argument places it in a dilemma. If the amendment *did* change the law, i.e., *if it was* the amendment rather than *Gunther* which for the first time made non-money awards unreviewable, then the statute, in that it deals with federal court jurisdiction, would have effect in this case to prevent the courts from making a *de*

novo determination as to the award, notwithstanding the fact that the amendment was intervening. See *Brotherhood of R.R. Trainmen* v. *Denver & R.G.W.R.R.*, 370 F. 2d 833 (10th Cir. 1966).

(5) *Seventh Amendment.*

Petitioner's final assertion as to why *Gunther* does not mean what it says is that if it did, it would be a denial of the employer's right to a jury trial. Petitioner cannot be serious about this. For all of the following reasons, the contention is totally without merit:

(a) Petitioner expressly waived its right to a trial by jury by agreeing to have minor disputes settled by Board decision, which was to be "final, binding and conclusive." (See R. 9; Court of Appeals opinion, Petition Appendix A 46).

(b) Actions to enforce awards of the type involved here were unknown to the common law. Court of Appeals opinion, Petition Appendix A 46; see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936); *Brady* v. *Transworld Airlines, Inc.*, 196 F. Supp. 504 (D. Del. 1961).

(c) The suit herein is one for equitable relief (as Petitioner admits in Petition 24), in which the recovery of money is a mere incident. In such cases there is no right to a jury trial. *NLRB* v. *Jones & Laughlin Steel Corp., supra.* The right has not been "abrogated" (Petition 24)—it never existed. The cases cited by Petitioner holding that a separate issue of damages must be tried by a jury are clearly distinguishable—an action for damages is at law.

3. (b) The question herein is not an important question of federal law.

Because of the amendments to §153, First, which were just discussed, it can certainly not be said that the question involved herein is an important question of federal law. Even assuming for the briefest moment that there is some merit to Petitioner's contention that *Gunther* did not bar *de novo* review of the type it seeks, still it is clear that such review is not permissible now that Congress has enacted the amendments to §3. As presently worded, §3, First (m) provides that "the award shall be final and binding upon both parties to the dispute," and §3, First (p) that an enforcement suit "the findings and order of the division of the Adjustment Board shall be conclusive on the parties." So, even if there were a substantial federal question before these amendments, there certainly is none now.

3. (c) The question herein need not and should not be treated by this Court at this time.

Even if Petitioner's unlikely contention that there is some ambiguity in *Gunther* were true as an abstract matter, it is abundantly clear that the federal courts considering *Gunther* have had no difficulty in understanding it. Since those courts are of a single mind as to the meaning of *Gunther,* (see discussion at §2, *supra*), it certainly appears neither necessary or desirable that this Court again address itself to the issue.

4. There is presently no conflict between any Courts of Appeal as to the federal question herein.

As noted above, (see §2, *supra*), there is unanimity in the decisions considering the effect of *Gunther.*

Conclusion

Respondents respectfully submit that Petitioner has shown no grounds justifying the grant of a writ of certiorari to the Court of Appeals for the Eighth Circuit. The Court of Appeals decision was not decided in conflict with the applicable decisions of this Court; on the contrary, it followed them. Nor is there presently any conflict among the circuits as to the question here involved. Moreover, if there were any legitimate doubt as to the question, the amendment of the underlying statute completely removes it. Petitioner appears to be the only one who is "confused" and "curious" about the question, and this Court's writ of certiorari was never intended to satisfy such individual confusion and curiosity.

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SUPREME COURT, U. S.

SEP 11 1967

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In The

Supreme Court of the United States

OCTOBER TERM, 1967

No. 304

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. RALL and R. E. LEE,

Respondents.

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In The

Supreme Court of the United States

OCTOBER TERM, 1967

No. 304

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. RALL and R. E. LEE,

Respondents.

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

This case involves the discharge of two pilots. The first pilot (Captain Rall) was discharged for drinking alcoholic beverages within 24 hours of the flight in violation of both a Company rule and a Union rule; the second pilot (Co-Pilot Lee) was discharged for serving while the Captain had an apparent physical deficiency. The discharged employees admit that "there is no dispute as to the fact that the employees committed the conduct complained of . . ." Brief in Opposition, p. 20. Under these circumstances, one wonders at the intemperate tone[1] of the Brief in Opposition.

[1] "Petitioner's claim . . . without the slightest merit," p. 6; "utterly without merit," p. 7; "imagined, but unarticulated," p. 8; "tortuous reasoning," p. 11; "plainly fallacious," p. 11; "tortured refusal," p. 13; "completely without merit," p. 21; "seizes upon the fact," p. 21; "totally without merit," p. 29.

In our Petition we set forth three reasons why certiorari should be granted. Without rearguing points raised in the Petition, we believe it will be helpful to consider each of those reasons as they are attacked by Respondents.

I. THE QUESTION OF THE DEGREE OF FINALITY OF AWARDS OF AIRLINE SYSTEM BOARDS OF ADJUSTMENT IS A SOURCE OF CONFLICT BETWEEN AIR CARRIERS AND THEIR EMPLOYEES, AND WILL CONTINUE TO CREATE CONFLICT UNTIL IT IS AUTHORITATIVELY SETTLED BY THIS COURT.

Respondents do not deny the importance of the issue, nor the fact that hundreds of thousands of employees, and numerous unions and companies are affected by the issue. They simply assert that the issue was settled by *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965).

As anyone who has overcome his initial naiveté in Railway Labor Act matters knows, *Gunther* deals with a *National Railroad* Adjustment Board award made pursuant to §3 of the Act, and §3 was not made applicable to air carriers by §201 or any other section.[2] The awards herein were rendered by *Airline System* Boards of Adjustment, created by contract. Decisions such as *Gunther* construing §3 NRAB awards do not necessarily provide answers to questions concerning contractually created Airline System Boards.

Respondents argue that §204 "unequivocally makes §3 of the Act applicable to §204 boards for the purpose of determining whether their jurisdiction exceeds that of §3 boards." Brief in Opposition, p. 8. Besides being tautological, this claim is beside the point. Only if this Court grants certiorari can it settle the question of how much *less* finality is *permitted* for awards of contractually created airline boards

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[2]Whether it was "expressly made inapplicable" or expressly not made applicable is an unimportant question of semantics. The important point is that §3 does not apply to air carriers by congressional action.

than is statutorily *required* of §3 railroad board awards.

Respondents also misapprehend our discussion of *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Brief in Opposition, p. 11. We agree that the contract involved herein (which is typical of almost all system board agreements) is a "federal contract and is therefore governed and enforceable by federal law, in the federal courts." 372 U.S. at 692. The question we raise is what the federal law has to say about this contract. *Central Airlines* does not settle the question of whether this contract provides for de novo review, prima facie effect, or some other standard. This Court is now asked to do so for the first time.

II. THE COURT OF APPEALS HAS DECIDED THE QUESTION OF THE DEGREE OF FINALITY OF AWARDS OF AIRLINE SYSTEM BOARDS IN CONFLICT WITH DECISIONS OF THIS COURT AND IN CONFLICT WITH LONG-ESTABLISHED PRECEDENTS IN THE COURTS OF APPEALS.

Respondents make no attempt to square §3 First (p) of the Railway Labor Act with §16(2) of the Interstate Commerce Act (although their argument makes the virtually identical congressional wording yield a vastly different result). Respondents make no attempt to square §3 of the Railway Labor Act with §§ 7-9 of that same Act, (although their argument makes the vastly different congressional wording yield a virtually identical result). Respondents do not contend that any decision prior to *Gunther* was consistent with *Gunther*. Instead they argue that since no decision had been rendered by this Court prior to *Gunther*, this Court was free to decide the case as it wished.

Our claim that petitioner has been deprived of its right to a jury trial is dismissed by respondents with the claim that we are not serious. Brief in Opposition, p. 29. Respondents urge that the right was waived. Yet respondents themselves

demanded a jury trial on the very day they sought summary judgment for the second time. R. 1001. Respondents claim that this action was unknown to the common law. Yet wrongful discharge cases are traditionally heard by courts. Respondents claim that equitable relief is sought, and that "the cases cited by Petitioner holding that a separate issue of damages must be tried by a jury are clearly distinguishable—an action for damages is at law."! Brief in Opposition, p. 29. That last non sequitur provides its own rebuttal.

III. CERTIORARI SHOULD BE GRANTED TO PREVENT FURTHER MISCONSTRUCTION AND MISAPPLICATION OF THE DECISION OF THIS COURT IN GUNTHER V. SAN DIEGO & ARIZ. E. RY., 382 U.S. 257 (1965).

As we argue in Part I of this Reply, *Gunther* has no relevance to a contractually created Airline System Board of Adjustment. It is misapplied.

We also argue that *Gunther* cannot be read to foreclose de novo review. It is misconstrued.

Respondents argue that their interpretation of *Gunther* is consistent with the earlier dissents of Justice Black. Brief in Opposition, p. 22. So do we. It is on that very basis that we challenge Respondents' interpretation of that case. If a dissenting view in one case is a majority view in another, then the earlier case has been reversed. Yet *Gunther* does not purport to reverse any cases. Therefore, we urge that the interpretation of *Gunther* advanced by respondents is a misinterpretation of that decision. This Court should grant certiorari to prevent further misinterpretation and misapplication in thousands of further instances in the billion dollar airline industry.

CONCLUSION

It is only after most serious study that we urge this Court to grant certiorari. As we see it, only such a grant can settle, for the hundreds of thousands of airline employees and their numerous unions and employees, the question of the applicability of §3 of the Railway Labor Act to Airline System Boards of Adjustment and the conflicting interpretation of the degree of finality provided by the industry-typical language employed in the contract involved herein.

Respectfully submitted,

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